STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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Quewanncoii C. Stephens
Executive Director

28 August 1991

Arlie R. Bartholomew
213A Orchard Street
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3200 Riverside Drive
P. O. Box 1958
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1100 Coal Exchange Bldg.
P. O. Box 2688
Huntington, WV 25726-2688

Re: Arlie Bartholomew v. Inco Alloys International, Inc.
Docket No. EA-619-87

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, amended and effective July 1, 1990, 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,

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

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

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.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARLIE R. BARTHOLOMEW,

Complainant,

v. DOCKET NO. EA-619-87

INCO ALLOYS INTERNATIONAL,

Respondent.

FINAL ORDER

On June 8, 1990, this matter came on for public hearing before Gail Ferguson, Hearing Examiner. On May 10, 1991, after consideration of the testimony and other evidence, as well as the proposed findings and other written submissions of the parties, the hearing examiner issued the Hearing Examiner's Final Decision. This decision directed that the case be dismissed with prejudice and be closed.

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, the Final Decision of the Hearing Examiner attached hereto is adopted, without modification or amendment, as the Final Order of the West Virginia Human Rights Commission, in accordance with § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22d day of August, 1991 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

May 9, 1991

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Re: Bartholomew v. INCO Alloys International, Inc.
EA-619-87

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§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."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARLIE R. BARTHOLOMEW,

Complainant,

v. DOCKET NUMBER(S): EA-619-87

INCO ALLOYS INTERNATIONAL, INC.,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on June 8, 1990, in Cabell County, at the City of Huntington, Municipal Bldg., City Council Chambers, Huntington, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Arlie R. Bartholomew, appeared in person and by counsel, Mary C. Buchmelter, Sr. Asst. Attorney General, who also appeared on behalf of the West Virginia Human Rights Commission. The respondent, INCO Alloys International, Inc., appeared by its representative, Larry Musick, and by counsel, Evan H. Jenkins, Esq..

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the hearing examiner and are supported by substantial evidence, they have been

adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

FINDINGS OF FACT

1. Complainant, Arlie Bartholomew, was originally employed by respondent, INCO Alloys International, Inc., in 1960.

2. Complainant's employment was governed by the Works Contract, a collective bargaining agreement ("Agreement") between respondent and the United Steelworkers of America Local No. 40.

3. Respondent had the sole authority to organize and direct the workforce under the Agreement.

4. Under the Agreement, respondent had the right to direct a reduction in force.

5. The Agreement recognized seniority rights of employees in appropriate circumstances with respect to permanent job assignments.

6. Under the Agreement, reductions in force were to be carried out based on seniority. Reduced employees, based on their plant seniority, could displace or "kick" less senior employees.

7. Respondent had the right under the Agreement to make temporary assignments from an unassigned "pool" or name department to fill in for employee absences.

8. The sole purpose of this pool was to maintain a group of laborers who had no permanent assignment, and who could be assigned to various departments to fill temporary needs.

9. Throughout his employment, complainant exercised his seniority rights under the Agreement and bid into various positions. On July 2, 1984, complainant originally bid into the Vacuum Induction Melting Department ("VIM").

10. Complainant remained in the department until, based on seniority, he was reduced out pursuant to a reduction in force on November 24, 1985.

11. Complainant's seniority permitted him to displace a junior employee in the Chipping department.

12. At a later date, complainant exercised his seniority and bid back to the VIM department. In 1987, the complainant was a step seven Auxiliary Reliner.

13. In early 1987, respondent experienced a downturn in business which necessitated a reduction in personnel. During a four month period in early 1987, over 150 employees were reduced out of five different departments, including the VIM department where the complainant was assigned.

14. On or before April 2, 1987, the superintendent of the VIM department, Vinoo Kamdar, made a decision that the VIM Department could operate on one less shift of employees. Kamdar posted a notice that effective April 12, 1987, six employees from the VIM department (one shift) would be reduced. The reduction was based on strict seniority under the terms of the Agreement. The six least senior

employees in the department were reduced. Complainant was the seventh least senior employee and was not initially affected.

15. At the time of the reduction, one employee from the VIM department, D.R. Beckett, was absent from work due to illness. Beckett was senior to the complainant. On April 27, 1987, D.R. Beckett returned to work, and it was necessary to reduce an additional employee. Complainant was the least senior employee in the department and was removed based on seniority. Complainant was reduced effective May 3, 1987. Complainant was 53 years old at this time.

16. Prior to Kamdar's decision to reduce his staff, the complainant had engaged in a discussion with Kamdar about the situation in the VIM Dept. Kamdar inquired about the possibility of combining departments. The complainant, who was a union steward as well as a mill grievance committeeman, advised against it.

17. After the reduction, the Agreement permitted the reduced employees to exercise their plant seniority to displace or "kick" to the job of a less senior employee.

18. Based on complainant's seniority, he had 11 positions available from which he could select. Complainant kicked to the Melting department as a laborer. At his request, he was permanently assigned that position on May 4, 1987.

19. Ordinarily, the job of laborer was an entry level position performed by new workers with limited shifts available. For approximately two weeks, the complainant performed the laborer work of sweeping and cleaning, thereafter he was given a job as a stopper-rod builder. The work the complainant performed after his

transfer was onerous and he was compelled to work odd shifts at a salary level which was lower than that he had commanded as a level seven auxiliary reliner.

20. Due to short-term absences of VIM employees after the reductions had been made, employees from the unassigned "pool," many of whom were younger and inexperienced, were temporarily assigned to the VIM department.

21. Both the labor agreement and respondent's past practice established that when temporary assignments were needed, that they were filled with employees from the unassigned "pool," also known as the "None" department without regard to seniority.

22. Under the agreement, the respondent had the discretion to "borrow" an employee who was permanently assigned to another department to fill a temporary need, however, "borrowing" was only used as a last resort when there were no available employees in the unassigned pool.

23. On or about June 22nd, 1987, respondent posted a bid for the position of Strip Mill Laborer. Complainant exercised his seniority rights and was awarded the bid which was effective June 29th.

24. In July of 1987, after the complainant had been in the Melting department more than four months, respondent posted for bid the Auxiliary Reliner position in the VIM department, the position from which complainant had been removed.

25. The complainant exercised his job bidding rights under the Agreement to return to this former job in the VIM department.

26. Complainant was the most senior bidder and was awarded the job which became effective July 27, 1987.

DISCUSSION

Judicial precedent in this jurisdiction has generally adopted the order and allocation of proof test established in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The complainant carries the initial burden of establishing a prima facie case of intentional discrimination. After this showing, the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for the employer's rejection. After the respondent has articulated a justification, the burden shifts back to the complainant to prove, by a preponderance of the evidence, that this reason was merely a pretext for the alleged discrimination. Shepherdstown V.F.D. v. WV Human Rights Commission, 309 S.E.2d 342 (1983); State ex rel. State of WV Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985).

In Conaway v. Eastern Associated Coal Co., 358 S.E.2d 423 (WV 1986), which was an age discrimination case, the West Virginia Supreme Court of Appeals established the principle that the illegal criterion need not be the sole motivating factor for a respondent's adverse action, but rather the determining factor in the sense that, but for the respondent's motive to discriminate, the adverse action would not have occurred.

In Conaway, the court proposed a general test for determining a prima facie case of illegal employment discrimination in situations where McDonnell Douglas is unadaptable. In order to make a prima facie case, a complainant must prove the following:

1. that the complainant is a member of a class;
2. that the employer made an adverse decision concerning the complainant; and
3. but for the complainant's protected status, the adverse decision would not have been made.

Applying the Conaway standard to the facts at bar, the complainant has established a prima facie case of age discrimination. It is undisputed that the complainant has satisfied two elements of the proposed test: class membership by virtue of his age, 53; and adverse action by virtue of respondent's decision to remove him or "reduce" him from a level seven position as an auxiliary liner in respondent's Vacuum Induction Department which therefore compelled him to bid on a level two position in respondent's melting department with a resultant loss in pay.

What the complainant must next show is some evidence that would sufficiently link the employer's decision and his status as a member of the protected class so as to give rise to an inference of discrimination. As pointed out by the court, in Conaway, a complainant may establishe the necessary nexus by evidence of disparate treatment between members of the protected class and others; through elimination of the apparent legitimate reasons for the adverse decision; by statistics; or by party admissions.

On the face of his complaint, the complainant alleges the following:

"1. On April 30, 1987, I was demoted from Auxiliary Reliner (Step 7) to Laborer (Step 2).

2. Vinoo Kamdar, Melting Superintendent, stated the demotion was necessary because there was no need for that many people in the department.

3. I believe that I have been discriminated against because of my age, 53, in that:

   a. Subsequent to my demotion, the respondent borrowed at least one man younger than myself, to perform the same duties that were my responsibilities, and gave the younger man five 10 hour plus days work.

   b. The younger man the respondent borrowed had less seniority and experience than I.

   c. John Tunderman, Management, stated the workforce was going to be manipulated and placed wherever they wanted them to, regardless of age and/or seniority.

   d. This demotion has resulted in a reduction in wages, which also affects my retirement, since it is based upon the best five out of the last ten years in wages.

   e. I have been forced to work irregular shift hours, which affects my health, as well as my well being since I have not been properly trained to perform some of the functions required."

The query as posed in Conaway is whether the complainant can inferentially show what he was "removed" or "reduced" from the VIM department because of his age.

Upon the instant facts, what creates the presumption is the disparity created by the removal of the complainant an older employee and the assignment of younger, less senior and inexperienced employees to the VIM Department to perform work the complainant could have performed.

The complainant has established a prima facie case, requiring the respondent to articulate nondiscriminatory reasons for its decision to reduce the complainant.

The respondent presented evidence that an economic decline in business precipitated the need to reduce personnel at its Huntington location. Moreover, that the staff reductions were not isolated to the VIM Department where the complainant worked, that during a four or five month period in early 1987, that approximately 20 reductions in force took place affecting as many as 150 to 200 employees.

The evidence further reveals that, in light of the economic downturn, respondent's management including complainant's supervisor, Kamdar, made the decision that the VIM Department could operate on one less shift of employees, and that the decision impacted, because of the labor agreement, on the six least senior employees within the department, all of whom were reduced. The respondent presented evidence that the complainant was the seventh least senior employee in the VIM department, and was not initially affected; that at the time of the reduction, an employee with more seniority than complainant was on sick leave, and that when that employee returned to work in late April, 1987, it became necessary to reduce the next least senior employee the complainant, Arlie Bartholomew. Moreover, respondent averred that the temporary employees it assigned to the VIM department after complainant's reduction, many of whom were younger, inexperienced and vested with no departmental seniority were so assigned to cover for absences of VIM employees who were not reduced. Evidence was also presented that both the collective bargaining agreement and past practice established that temporary

assignments when needed, were filled with employees from the unassigned "pool," also known as the "None department." According to the respondent, the sole purpose of this pool was to maintain a group of laborers who have no permanent assignment and who could be assigned to various departments to fill temporary needs.

The collective bargaining agreement governing respondent's non-management workers provides in pertinent part:

> [E]mployees otherwise unassigned to a department will continue to be deemed assigned to the unassigned department but will not while deemed so assigned accumulate departmental seniority in that department. The Company will solicit from each department each week its need for such otherwise unassigned employees during the next week.

By said evidence, the respondent has met its burden of production, which the complainant has failed to prove as pretextual, unworthy of credence or as motivated by age discrimination.

It is not clear whether the complainant challenges the validity of respondent's reduction in force generally as created by poor business conditions or rather whether it is merely his reduction from the VIM department which he believes was unnecessary and discriminatory. If it is the former contention, complainant's evidence is insufficient to establish pretext. However, the complainant maintains that he made known his disagreement with respondent's decision as to the proper number of persons required in the VIM department before the reductions. Further, that the respondent should have foreseen the need for replacement personnel and that he should have been retained to fill that need. Without more, however, that decision was management's prerogative. The complainant then urges that evidence that the temporarily assigned

employees worked ten hour shifts and overtime establishes pretextuality as to respondent's defense that a reduction in the VIM department was necessary. However, the evidence reveals that the department worked a four day, ten hour shift. The complainant presented insufficient evidence that work was abundant or that temporary workers were used contrary to the collective bargaining agreement. Finally, the complainant contends that respondent should have returned him to the VIM Department from the Melting Department where he was permanently assigned following his reduction, when additional personnel was needed in VIM, rather than temporarily assigning personnel from the "None" department. While evidence reveals that respondent was not prohibited from "borrowing" an employee who was permanently assigned to another department to fill a temporary need, the evidence indicates that the past practice of respondent and the preference of employees was not to borrow employees unless there were no available employees in the assigned pool.

The complainant has not established that age consideration was a factor, much less the sole or determining factor considered by respondent as the basis for its decision to reduce him.

Accordingly, the complainant has failed, by a preponderance of the evidence, that respondent discriminated against him based on his age, in violation of the West Virginia Human Rights Act.

CONCLUSIONS OF LAW

1. The complainant, Arlie R. Bartholomew, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, INCO Alloys International, Inc., is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of age discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has failed to establish, by a preponderance of the evidence, to be pretext for unlawful age discrimination.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby ORDERED that this case be dismissed with prejudice and be closed.

It is so ORDERED.

Entered this 10th day of May, 1991.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER