BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RAFAEL A. BEATTY,

Complainant,

v. DOCKET NUMBER(S): ER-42-90

LOGAN COUNTY SHERIFF'S DEPT.,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on April 9, 1991, in Logan County, Logan, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Rafael A. Beatty, appeared in person and by counsel, Assistant Attorney General Paul Sheridan. The respondent, Logan County Sheriff's Department, appeared by its representative, Sheriff Oval Adams.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter.[1/] 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

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1/ The respondent filed no post hearing submissions.

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.

I.

PRELIMINARY MATTER

1. The complainant, Rafael Beatty, is entitled to a default judgment.

2. The respondent, Logan County Sheriff's Department, was served with the commission's first interrogatories and request for production of documents on January 10, 1991. When no reply was made, the commission moved to compel on February 22, 1991.

3. On February 26, 1991, the hearing examiner issued an order compelling the respondent to reply to the commission's discovery on or before March 7, 1991.

4. On March 14, 1991, when the hearing examiner's order to compel had not been complied with, the commission moved to strike the respondent's answer and for a default judgment.

5. On March 18, 1991, the hearing examiner issued an order to show cause, giving the respondent five days after receipt of the order to show cause why a default judgment should not be entered against the Logan County Sheriff's Department.

6. Prior to hearing, the respondent filed no reply to the hearing examiner's order to show cause. At hearing, the respondent gave no reason for its contempt of the commission other than lack of legal representation, ostensibly because according to Sheriff Adams the prosecutor's office maintained that it did not represent the sheriff's department, a situation which had existed throughout the course of these proceedings.

II.

DISCUSSION

The complainant is entitled to a verdict by default judgement.

Rule 7.27.5 of the Procedural Rules of the West Virginia Human Rights Commission, provides:

> If a party or an officer, director, or managing agent of a party or a person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the hearing examiner may make such orders in regard to the failure as are just, and among others, the following:
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> * * *
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> An order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

At the public hearing on April 9, 1991, the hearing examiner took up the motion to strike respondent's answer and for a directed verdict which the commission, on behalf of the complainant, had earlier filed and served upon respondent. The motion cited the

respondent's failure to comply with the hearing examiner's earlier order compelling the respondent to answer discovery, and the respondent's failure to answer the hearing examiner's subsequent order to show cause.

When asked by the hearing examiner to explain his failure to comply with these directives, the sheriff offered no explanation, other than that the office of the prosecutor was not assisting him. The hearing examiner had earlier inquired at length as to this situation. It is clear from the record that the Logan County Sheriff's Department had ample opportunity to clarify its relationship with the prosecutor's office and to make whatever arrangements it deemed appropriate for legal representation.

The respondent in this case, by failing to comply with the discovery order, made itself subject to sanctions. The respondent then exacerbated its arbitrary stance by failing to reply to the show cause order as to why default sanctions should not issue. The hearing examiner granted the commission's motion for a default judgement only after the respondent's flagrant and continuous refusal to comply.

The examiner acknowledges that imposition of default judgement is a severe sanction; however, unless there is some consequence for a party's intentional disregard of an examiner's reasonable orders, thus evidencing a contempt of the commission, the commission's ability to effecutate the purpose of the statute in an impartial and fair manner will be severely compromised. Here, where the respondent has been given numerous opportunities to exhibit some cooperation, and had failed them all, a default judgement is appropriate.

The undersigned examiner, however, is not unmindful of the statutory principle that an examiner's final decision is not binding upon the commission, even one premised on a party's default. Accordingly, the parties were directed to present all available evidence at the April 9, 1991, hearing on the merits of the claim in order to insure a complete record. A review of the evidence as a whole, clearly and independently establishes the appropriateness of a judgment for the complainant as supported by findings of fact and discussion below.

III.

FINDINGS OF FACT

1. The complainant, Rafael Beatty, is a black male and a resident of Logan County, West Virginia.

2. The respondent, Logan County Sheriff's Department, has the statutory duty to operate the jail and is responsible for hiring correctional officers for the Logan County Jail.

3. The Logan County Jail is also governed by a federal court order issued by Federal District Judge Robert J. Staker, which provides, among other things, that the jail shall employ at least twelve full-time correctional officers.

4. Oval Adams is the sheriff of Logan County, and was the sheriff during th relevant time period and continues as sheriff.

5. On or about March 16, 1989, the complainant submitted an application for employment as a correctional officer with the respondent.

6. The complainant took the Correctional Officer's Civil Service Exam and scored 87. He was placed third on a list of eligible candidates.

7. On June 2, 1989, three candidates were certified, including the complainant; however, when one of the three withdrew her name, the initial certification was resubmitted on June 21. This certification also included the complainant. At this point, complainant was second on the eligible list. The other candidates were Clarence F. Robinson and David R. Porter, both of whom are white. Sheriff Adams selected Clarence Robinson from the list.

8. On June 30, 1989, the Civil Service Commission certified three names for a second position. This certification included the complainant, the aforementioned David Porter and Charles T. Strickland, Jr., also a white male. Sheriff Adams selected David R. Porter from the list.

9. On June 30, 1989, Sheriff Adams notified the President of the Logan County Correctional Officer's Civil Service Commission by two separate letters that he had selected Clarence Robinson and David R. Porter. Sheriff Adams also requested that the Civil Service Commission send to him the listing of the next three eligible correctional officers.

10. Sheriff Adams testified that in June 1989 he had only been seeking to hire two correctional officers. He attempted to explain his request for a third list of certified candidates, after hiring

Porter and Robinson, by saying it is automatic; however, WV Code §7-14B-11 clearly provides that the certification is to be done, at the sheriff's request and at the time of a vacancy.

11. Sheriff Adams testified that after he hired Porter and Robinson he had a total of twelve correctional officers. However, when asked to list the officers who were employed at that time, the sheriff, referring to a document which purported to be a complete list on September 20, 1989, could only list eleven.

12. On July 6, 1989, the Civil Service Commission certified to the sheriff a list of three candidates, including complainant, the aforementioned Charles T. Strickland, Jr., and Jack David Burgess, who is a white male.

13. The complainant was well qualified to be a correctional officer. He had a high school degree, and two years of college courses in the area of criminal justice. He had served in the U.S. Army and received an honorable discharge. He had work experience as a security guard, as a paralegal and in sales. He also was given numerous good references.

14. The complainant was interviewed some time during the month of June 1989.

15. On or about July 6, 1989, the complainant was called in to speak directly with the sheriff. The complainant was notified that he had some unpaid traffic citations which he needed to take care of. He went downstairs in the courthouse to the magistrate's office and made arrangements to pay the traffic citations. Sheriff Adams told complainant that the only thing standing in his way was these

unpaid citations. Complainant was told that he would be called later that evening or the next morning to be told when to report.

16. The complainant did not receive a call for the respondent as he had been told. He later telephoned the respondent, and after several attempts finally was able to talk to Sheriff Adams. Sheriff Adams told complainant that he had decided to hire only two correctional officers. Sheriff Adams offered no other explanation as to why the complainant was not being hired.

17. It is also clear from the evidence that the sheriff aborted his effort to hire a third correctional officer in 1989. A federal court order required him to have an additional correctional officer; he made a request for the certification list from the Civil Service Commission indicating a vacancy; and he was interviewing for the position as late as July 6, days after he had filled the other positions.

18. The respondent never provided the complainant with a reason as to why he was not hired; however, in explaining at the hearing why he had not hired the complainant, the sheriff claims that complainant did not "pass" the Criminal Investigation Bureau (CIB) check. When asked to identify the problems which were identified in the CIB check, the sheriff produced an arrest warrant styled Number 90-F-35. However, when pressed on the matter, the sheriff was forced to admit that this warrant was not even sworn until December 27, 1989, long after the events relevant to this case and after this action had been filed. This could not possibly have been a consideration in June or July 1989.

19. The other items which the sheriff identified as having turned upon complainant's CIB check were "outstanding" traffic citations and worthless check warrants. However, the sheriff later had to admit that the worthless check warrants had been taken care of and dismissed almost ten years earlier. The only proximate blemish on the complainant's record was the traffic citations. Regarding the traffic citations, the sheriff first denied having discussed them with complainant, but then later admitted that he did and that complainant took care of the paying the citations immediately.

20. The sheriff also claimed, but only after being asked repeatedly, that the "background check" on the complainant included individuals who made "sexual assault allegations" against the complainant.

21. The alleged rape allegations were never explained by the sheriff, and it is fairly clear that the sheriff knew little, if anything, about the alleged incident. Despite the fact that the respondent has both the duty and the resources to investigate criminal allegations such as this, the respondent never conducted any investigation of this alleged crime. No charges were ever brought against the complainant for this alleged crime, and there is absolutely nothing in the record which even tends to show that such an incident occurred. When pressed about how little the sheriff had done to investigate this very serious charge of rape, the sheriff replied, "I checked it out to the satisfaction of me...." Regarding his acting upon unsubstantiated allegations along, the sheriff stated, "which leads to the theory sometimes 'where there's smoke there's fire.'"

22. The sheriff never established when he made the decision not to hire the complainant. If the sheriff's records are to be believed, he was aware of the alleged rape on June 14, 1989. Despite his claim that his decision not to hire complainant was based on the background check, the sheriff claims that he had not decided not to hire the complainant as of July 1, 1989. And on July 6, 1989, the date the complainant paid his traffic citations, the sheriff was still involved in interviewing complainant and considering his application. In this interview, three weeks after the sheriff was made aware of the alleged incident, he made no mention of it to the complainant. It was well into July, when the complainant called the sheriff to see why he had not been called in to start work, that the sheriff informed him that he had decided to hire two correctional officers.

23. The sheriff testified that his Deputy David Townsend had conducted the background check. Townsend was not called as a witness.

24. The types of "recommendations" upon which the sheriff claimed to rely upon were not credible. No one from the respondent talked directly to the alleged victim of this rape, or to anyone who had any firsthand knowledge. Nor was the complainant asked about it. Regarding those who were asked, the evidence hardly establishes a basis for the sheriff to give these negative recommendations any weight. For example, the sheriff said he talked to Marvin Henderson when he ran into him at a gas station. The sheriff made no notes of the conversation. Mr. Henderson gave no reason for his not recommending complainant. The sheriff later said he was sure Henderson gave a reason for not hiring complainant, although he could

not remember what it was. The sheriff also talked to a Mr. Turner, who said he did not care much for complainant. The sheriff said he had no idea what Turner's standing in the community was. In fact, the sheriff was not even sure if the man's name was Larry Turner or Michael Turner. At one point, the sheriff referred to him as Zeke Turner. This person, whatever his name was, wanted a job, and tried to discourage the sheriff from hiring the complainant. It also appears that this conversation occurred after the human rights action had been filed.

25. The sheriff also indicated he gave weight to the negative recommendation of Oscar Watkins. This person was alleged to have raised concerns about complainant's "drinking." This was not something which the sheriff thought to mention when he was pressed about all the reasons for not hiring the complainant.

26. While the sheriff claims, in the face of contrary evidence, that he only needed two new hires in June, 1989, he admits that he was short-handed in the jail between approximately November 1989 until April 1990.

27. The sheriff acknowledged that he held off on hiring from November 1989 until April 1990, when a new test was given, in order to avoid considering the complainant.

28. If there was any evidence to substantiate the rape allegation which the sheriff claims was the basis of his decision not to hire complainant, the sheriff could have initiated statutory proceedings to have the complainant declared ineligible.

29. The complainant suffered humiliation, embarrassment and emotional distress because of respondent's action.

30. The complainant's backpay, with compounded interest totaled $24,824.81 as of April 1, 1991, as set forth in Exhibit A.

31. The complainant seeks appointment to the next available correctional officer position with respondent.

II.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act (hereinafter "Act"). West Virginia Code §5-11-1 et seq. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminated against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race...."

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful race discrimination, or the commission acting on their behalf, must ultimately show by a preponderance of the evidence that:

(1) the employer excluded him from, or failed or refused to extend to him, an equal opportunity;

(2) race was a motivating or substantial factor causing the employer to exclude the complainant from, or fail or refuse to extend

to him an equal opportunity, Price Waterhouse v. Hopkins, ___U.S.___, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989); and

(3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment

Since discriminating employers usually hide their bias and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our supreme court in Shepherdstown V.F.D. v. State Human Rights Commission, 309 S.E.2d 342 (WV 1983). The McDonnell Douglas method requires that the complainant or commission first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant or commission must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The term "pretext," as used in the McDonell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496 (WV 1989), citing Black's Law Dictionary, 1069 (5th ed. 1979). A proffered reason is a pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal, 358 S.E.2d 423, 430 (WV 1986).

There is also the "mixed motive" analysis. Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed-motive" analysis. This analysis was established by the U.S. Supreme Court in Price v. Waterhouse v. Hopkins, ___U.S.___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and recognized by the West Virginia Supreme Court of Appeals in West Virginia Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490, 496-97, n.11 (WV 1989). If the complainant proves that his race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's race.

The prima facie case has been clearly established by the evidence. In a case of alleged failure to hire because of race, the prima facie burden is met under the McDonnell Douglas test upon a showing that: (1) complainant was black; (2) that he applied for a job with the respondent for which he was qualified; (3) he was not hired; and (4) the respondent continued to accept similarly qualified applicants or hired other similarly qualified applicants who were not black. See, O.J. White Transfer & Storage Co., Inc. v. WV Human Rights Commission, 369 S.E.2d 323 (WV 1989); City of Ripley v. WV Human Rights Commission, 369 S.E.2d 226 (WV 1988); Pride, Inc. v. State ex rel. WV Human Rights Commission, 346 S.E.2d 356 (WV 1986); Shepherdstown V.F.D. v. WV Human Rights Commission, 309 S.E.2d 342 (WV 1983). The prima facie burden is not onerous, but is merely designed to eliminate "the most common nondiscriminatory reasons" for

an applicant's rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254. (1981).

Here, there is no serious doubt that the complainant established a prima facie case of discrimination. First, it is undenied that complainant is black, and as such is a member of a group protected by the Act. Second, it is similarly clear that he applied for a position as deputy sheriff, that he took and scored well on the deputy sheriff civil service examination, that he was certified by the civil service commission as qualified, and that he was in fact qualified for the position based upon the objective qualifications. Third, it is clear that the complainant was denied the position, while similarly qualified white applicants were hired. There is also evidence that the respondent intentionally delayed hiring a correctional officer, who was necessary to meet staffing requirements, until the complainant's name could be replaced by a new civil service list.

Having established a prima facie case, the commission created a "presumption that the employer unlawfully discriminated against" the complainant, Burdine, 450 U.S. at 254; Shepherdstown, 309 S.E.2d at 352, and "the burden then shifted to the defendant...to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, at 254. Though the burden on respondent is only one of production, not persuasion, to accomplish it a respondent "must clearly set forth through the introduction of admissible evidence the reason for [complainant's] rejection." Ibid. The explanation provided "must be clear and reasonably specific," Burdine, at 258, and "must

be legally sufficient to justify a judgment for the defendant," Id. at 254, and it must be both legitimate and nondiscriminatory. Id. at 254.

If the respondent articulates a legitimate, nondiscriminatory reason for rejecting the complainant, then the issue becomes whether the offered reason was, in fact, the reason or a reason for the adverse action. "[T]he complainant [or the commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, at 352. The commission "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, at 256.

The respondent claims that the complainant was not hired because of problems with his background check. The respondent cites a bad check warrant which was dismissed almost ten years before, another warrant that was not filed until over six months after, and two traffic citations, which were paid by the complainant immediately upon being notified of their existence. Respondent also cites poor references, virtually all of which regard an alleged sexual assault involving the complainant. These allegations are not authoritative, either for the purpose of making an informed judgment on complainant's application for work or for the purpose of bringing the perpetrator to justice.

The respondent has met this production burden of articulating a legitimate, nondiscriminatory reason for failing to hire the

complainant. The evidence which exposes this reason as pretext is discussed below.

The third step in the theoretical proof scheme involves an evaluation of the motives or reasons proffered by the respondent for its adverse action.

> This third step of the theoretical proof scheme is based upon a realization that some explanations are the product of hindsight rather than a true barometer of what occurred at the time of the decision. Holbrook v. Poole Associates, Inc., ___S.E.2d___(WV 1990) (Slip Opinion No. 19178, filed Dec. 17, 1990, pp. 7-8).
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> "Pretext" means an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense. Black's Law Dictionary 1069 (5th ed. 1979). A proffered reason is a pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., ___WV___, 358 S.E.2d 423, 430 (1986).

The question raised at this stage is not whether the offered reason might have justified the action, but whether it is "the true reason for the decision." WV Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496 (WV 1989).

The only reason given by respondent for not hiring the complainant, even though it has not been "articulated" except by inference, is that the complainant "failed" his background check. The respondent has not been straightforward in asserting these or any reasons for not hiring the complainant. No reasons are clearly set out in respondent's answer. The respondent never replied to the commission's discovery which, among other things, requested a list of reasons, and the respondent never filed a prehearing memorandum, which should have stated its theory of the case.

The respondent's failure to clearly articulate a reason from the out set, and to stick to it, is in itself a strong indicia of pretext. Courts have been extremely skeptical of stated reasons which are not asserted until late in the "game." Foster v. Simon, 467 F. Supp. 533 (W.D. N.C. 1979); Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973). Likewise, shifting reasons or defenses between the time of the adverse action and the time of the hearing is strong evidence of pretext. Smith v. American Service Co., 611 F. Supp. 321, 35 F.E.P. 1552 (N.D. Ga. 1984); Townsend v. Grey Line Bus Co., 597 F. Supp. 1287, 36 F.E.P. 577 (D. Mass. 1984), aff'd, 767 F.2d 11, 38 F.E.P. 463 (1st Cir. 1985).

For several other reasons as well, the sheriff's explanation as to why he did not hire the complainant is not credible. It is undisputed that the respondent never gave the complainant a reason why he was not hired. Complainant was interviewed, measured for a uniform and told that he would be contacted shortly. When he did not hear from the respondent, he called, and after several attempts, managed to speak to the sheriff, who told him only that the respondent had decided to hire only two correctional officers. Given that the sheriff was under a federal court order to hire an additional correctional officer, and that he had begun the process as if he was going to hire a third officer, this clearly was a change in plans.

The timing on this apparent change in plans is significant, because it occurred well after the sheriff had all the information which he now claims was the basis of his decision not to hire the

complainant. The background check on the complainant, which the sheriff claims the complainant "failed," was conducted in mid June. Complainant was not told that he was not being hired until mid July.

In explaining at the hearing why he had not hired the complainant, the sheriff claimed that complainant did not "pass" the CIB check. When asked to identify the problems which were identified in the CIB check, the sheriff produced an arrest warrant styled Number 90-F-35. However, when pressed on the matter, the sheriff was forced to admit that this warrant was not even sworn until December 27, 1989, long after the events relevant to this case and after this action had been filed. This could not possible have been a consideration in June or July 1989.

The other items which the sheriff identified as having turned upon a complainant's CIB check were "outstanding" traffic citations and worthless check warrants. However, the sheriff later had to admit that the worthless check warrants had been taken care of and dismissed almost ten years earlier. The only proximate blemish on the complainant's record was the traffic citations. Regarding the traffic citations, the sheriff first denied having discussed them with the complainant, but then later admitted that he did and that complainant took care of paying the citations immediately.

The sheriff also claimed, but only after being asked repeatedly, that the "background check" on the complainant included individuals who made "sexual assault allegations" against the complainant. These alleged rape allegations were never explained by the sheriff, and it is fairly clear that the sheriff knew little, if anything, about the alleged incident. Despite the fact that the respondent had both the

duty and the resources to investigate criminal allegations such as this, the respondent never conducted any investigation of this alleged crime. No charges were ever brought against the complainant for this alleged crime, and there is absolutely nothing in the record which even tends to show that such an incident occurred.

When pressed about how little the sheriff had done to investigate this very serious charge of rape, the sheriff replied, "I checked it out to the satisfaction of me...." Regarding his acting upon unsubstantiated allegations along, the sheriff stated, "which leads to the theory sometimes 'where there's smoke there's fire.'"

The sheriff never established when he made the decision not to hire the complainant. Despite his claim that his decision not to hire complainant was based on the background check, the sheriff claims that he had not decided not to hire the complainant as of July 1, 1989. And on July 6, 1989, the date the complainant paid his traffic citations, the sheriff was still involved in interviewing complainant and considering his application. In this interview, three weeks after the sheriff was made aware of the alleged incident, he made no mention of it to the complainant. It was only well into July, when the complainant called the sheriff to see why he had not been called in to start work, that the sheriff informed him that he had decided to hire two correctional officers.

The sheriff testified that his deputy, David Townsend, had conducted the background check. Townsend was not called as a witness. In fact the sheriff called no witnesses.

The types of "recommendations" upon which the sheriff claimed to rely upon were not credible. No one from the sheriff's department

talked directly to the alleged victim of this rape, or to anyone who had any firsthand knowledge. Nor was the complainant asked about it. Regarding those who were asked, the evidence hardly establishes a basis for the sheriff to give these negative recommendations any weight. For example, the sheriff said he talked to Marvin Henderson when he ran into him at a gas station. The sheriff made no notes of this conversation. Mr. Henderson gave no reason for his not recommending complainant. The sheriff later said he was sure Henderson gave a reason for not hiring complainant, although he could not remember what it was. The sheriff also talked to Mr. Turner, who said he did not care much for complainant. The sheriff said he had no idea what Turner's standing in the community was. In fact, the sheriff was not even sure if the man's name was Larry Turner or Michael Turner. At one point, the sheriff referred to him as Zeke Turner. This person, whatever his name was, wanted a job, and tried to discourage the sheriff from hiring the complainant. It also appears that this conversation occurred after the human rights action had been filed.

The sheriff also indicated he gave weight to the negative recommendation of Oscar Watkins. This person was alleged to have raised concerns about complainant's "drinking." This was not something which the sheriff thought to mention when he was pressed about all the reasons for not hiring the complainant.

While the sheriff claims, in the face of contrary evidence, that he only needed two new hires in June 1989, he admits that he was short-handed in the jail between approximately November 1989 until April 1990. The sheriff acknowledged that he held off on hiring from

November 1989 until April 1990, when a new test was given, in order to avoid receiving the complainant on the certification list.

If there was any evidence to substantiate the rape allegations which the sheriff claims was the basis of his decision not to hire complainant, the sheriff could have initiated proceedings under §7-14B-10 to have complainant declared ineligible as having "been guilty of infamous or notoriously disgraceful conduct." This would have permitted the sheriff to have selected from three new candidates without regard to complainant.

Obviously, the sheriff has not been forthright in explaining his decision not to hire the complainant. The reasons he has offered are pretext for the respondent's racial discrimination.

"[I]t is incumbent upon [the factfinder] to make the ultimate determination whether there was intentional discrimination on the part of respondent." Shepherdstown, 309 S.E.2d at 353. In short, the factfinder "must decide which party's explanation of the employer's motivation it believes." U.S. Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478, 1482 (1983). "In this regard, the trier of fact should consider all the evidence, giving it whatever weight and credence it deserves," Id. at 1481, n.3, and decide whether, in the final analysis, respondent treated complainant "less favorably than others" because of his race. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. Human Rights Commission, 382 S.E.2d 562, 567, n.6 (WV 1989).

Complainant's testimony was straightforward and essentially undisputed. He applied for a job as a correctional officer, took the civil service exam and scored well. He was called in for interview, explained the job and measured for a uniform. He was told to pay off a traffic citation and that he would be called as to when to start. He never heard anything more from the respondent. When he called he had difficulty getting through to the sheriff, and when he finally did, the sheriff merely told him that they were only filling two positions.

The sheriff's explanation on why complainant was not hired is internally inconsistent and is not credible. He tried to claim that he was only hiring two officers, despite the very clear evidence that he needed and was seeking three. He was later forced to admit that he later delayed hiring in order to avoid giving further consideration to complainant.

The sheriff also tried to explain his not hiring complainant by reference to his "background check." Respondent first emphasized the CIB check, and cited three items he claimed were reported in this check. The first was a warrant that was not even sworn until six months after when this CIB check was supposedly run, and so could not possibly have been a part of it. The second was a warrant for a worthless check which had been taken and resolved ten years before, and would hardly have been a reasonable basis for rejecting the complainant. The third involved traffic citations, which the complainant dealt with immediately at the request of the sheriff. None of these provide a reasonable basis for the complainant's

rejection, and there use by the sheriff as explanation reeks of pretext.

The other part of the complainant's background check which the sheriff refers to, but only after he has offered the previously stated reasons and attempted to explain his decision in terms of them, is allegations linking the complainant to an alleged incident of sexual assault. If the complainant had committed an act such as what was alluded to, it would indeed be a very good reason for rejecting him as a candidate; but there was nothing more than allusion and allegation.

The sheriff did not call any witnesses in support of his claims; not even his own officer whom he claimed performed the background check. The sheriff never even became specific in saying what the complainant was supposed to have done, or even what he was accused of doing, and one cannot tell from the record any details. Interestingly, the sheriff seems to have solicited the allegations regarding the complainant, from people some of whose names he could not remember, and then relied upon these allegations, without any investigation of them, in turning the complainant down.

Reliance upon such flimsy and unsubstantiated reports of such a serious nature would be unjust by any employer. Even credible charges of this nature should be verified in some way, and the complainant would be entitled a chance to address the allegations and refute them. But it would be even more outrageous for a sheriff's department to fail to investigate such a charge, since its duty to do so stems not only from an obligation of fairness to the applicant but an obligation to see that a crime does not go unpunished.

The sheriff's testimony is not credible as to his reasons for not hiring complainant. The racial motive behind the failure to hire complainant shows through the respondent's pretexts. The complainant has sustained his claim.

CONCLUSIONS OF LAW

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

2. The respondent, Logan County Sheriff's Department, 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. The complainant is entitled to a default judgment.

6. Alternatively, complainant has established a prima facie case of race discrimination.

7. The respondent has articulated legitimate nondiscriminatory reasons for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretexts for unlawful discrimination.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay with statutory prejudgment interest in the aggregate amount of $24,824.81 through April 1, 1991

9. Until the complainant is appointed as a correctional officer by respondent, he is entitled to additional wages from April 2, 1991, less any intereim earnings accrued up to his date of appointment.

10. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $2,500.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall immediately cease and desist from engaging in unlawful discriminatory practices on the basis of race in its employment decisions.

2. Within 31 days of receipt of this order the respondent shall pay to the complainant backwages and interest in the amount of $24,824.81, said amount having accrued up to and including April 1, 1991, as set forth in Exhibit A.

3. The respondent shall appoint the complainant to the next available correctional officer position.

4. The respondent shall provide the complainant with recompense for loss wages from April 2, 1991 until said time as a correctional officer position is offered to the complainant, less any offset from complainant's interim earnings. Interest on said wages shall accrue on the last day of each calendar quarter on the amount then due.

5. Within 31 days of receipt of this order, the respondent shall pay to complainant $2,500.00 as incidental damages for humiliation, embarrassment and emotional distress suffered by complainant because of respondent's unlawful discrimination.

6. The respondent shall pay ten percent per annum interest on all monetary relief.

It is so **ORDERED**.

Entered this 7th day of November, 1991.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER