STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: 304-348-2616

GASTON CAPERTON
GOVERNOR

October 2, 1989

Gary Freeman
5208 Dorsey Rd.
Morgantown, WV 26505

Southern Ohio Coal Co.
Martinka Office
P.O. Box 552
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Robinson & McElwee
P.O. Box 1791
Charleston, WV 25326

Re: Freeman v. Southern Ohio Coal Co.
ER-201-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the Kanawha County Circuit Court within 30 days of receipt of this final order.

Sincerely,

Norman Lindell

Norman Lindell
Acting Executive Director

NL/mst

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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 advserse 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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GARY FREEMAN,

Complainant,

v. DOCKET NUMBER: ER-201-86

SOUTHERN OHIO COAL COMPANY,

Respondent.

ORDER

On the 21st day of September, 1989, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, James Gerl, supplemental order and decisions and the proposed stipulations of the parties, in the above-captioned matter. After consideration of the aforementioned and the exceptions thereto, the Commission does hereby adopt said proposed order and decision, encompassing findings of fact and conclusions, the supplemental order and decision and the stipulations of the parties, as its own, with the modifications and amendments set forth below.

In subsection "Proposed Order" of the original proposed order and decision, paragraph number four is modified to read: "That the respondent pay to the complainant the sum of $2,500.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory failure to hire."

It is hereby **ORDERED** that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, supplemental order and decision and stipulations of the parties, be attached hereto and made a part of this final order except as amended by this final order.

By this final 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 final order and that they may seek judicial review.

Entered this 2nd day of October, 1989.

RESPECTFULLY SUBMITTED,

BY George Rutherford/rc
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

GARRY FREEMAN

Complainant,

v. DOCKET NO. ER-201-86

SOUTHERN OHIO COAL COMPANY,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on March 11, 12, and 13, 1987 in Fairmont, West Virginia. The complaint was filed on October 15, 1985. The notice of hearing was served on May 30, 1986. Respondent answered on June 12, 1986. A Status Conference was held on August 26, 1986. Subsequent to the hearing, respondent and complainant submitted written briefs and proposed findings of fact. In addition, the parties continued to litigate this matter even after the hearing. Post hearing litigation included five evidentiary depositions; three written motions; one motion hearing; the admission of documentary evidence; and reams of correspondence.

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 they 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

Complainant contends that respondent discriminated against him on the basis of his race by failing to hire him. Respondent maintains that complainant was not hired because he was not as qualified as the applicants who were hired.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant, who is black, applied for a position with respondent at its Martinka Mine in Marion County, West Virginia on a number of different occasions, including September 20, 1982, May 22, 1984 and June 11, 1985.

2. Subsequent to complainant's application for employment on June 11, 1985, respondent hired four individuals into the position of production supervisor at Martinka Mine in Marion County, West Virginia.

3. Respondent did not hire complainant.

4. Respondent is a corporation engaged in the business of coal mining in the State of West Virginia.

5. Respondent is a wholly owned subsidiary of Ohio Power Company.

6. As of July 31, 1985, the salary for an entry level inby supervisor at respondent's Martinka Mine as $3,408.00 per month, or $40,900.00 per year. Effective April 1, 1986, the salary for said position was increased to $3,558.00 per month, or $42,700.00 per year.

7. If complainant had been hired by respondent he would have earned $66,402.00 from August 1, 1985 through March 1, 1987.

8. Typically section inby supervisors work one or two extra shifts per month at the Martinka Mine. If complainant had been working at the Martinka Mine, he would have earned, in addition to his regular wages, $3,052.72 for working one extra shift per month or $6,105.44 for working two extra shifts per month.

9. Complainant has had a mine foreman/fire boss certificate since November 1, 1978.

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

10. Complainant's application for employment has been active and up-to-date since May 22, 1984.

11. Zanussi, respondent's Personnel Supervisor at the Martinka Mine, told complainant that respondent was not hiring. This statement was false.

12. Complainant had twelve years experience as an underground coal miner.

13. Complainant had approximately 19 months experience as a section foreman at Bethlehem Coal. In addition, complainant had about 4 months experience as a relief foreman while he was still in the Union.

14. Although complainant's title at Bethlehem was "construction foreman", his actual duties involved the removal of coal.

15. Respondent hired at least eleven white persons for supervisor positions while complainant had an active application for a supervisor position on file with respondent. Among the white persons so hired were the following: Sweetnish, whose only underground experience consisted of foreman jobs during three summers plus an additional three months at Julian Mine for a total of approximately 17 months experience as a foreman; and Glass, who was hired as a belt foreman and who had no supervisory experience.

16. Respondent records the race of applicants for employment on interview sheets which are attached to the sheet from which the hiring decision is made.

17. Respondent's primary method of recruiting new supervisors is through word of mouth.

18. Majic, respondent's personnel director, told Jackson, a black employee, that more blacks would be hired by respondent if one other black employee, Hood, wasn't absent so much.

19. On one occasion, Hood was called "nigger" in front of Porter, a white supervisor. The supervisor took no action to correct this situation. After the Union interceded, however, Hood received an apology.

20. There is no pattern and practice of discrimination against blacks at respondent.

21. An unusually large number of formal complaints of race discrimination have been filed against respondent. Respondent does not take such complaints seriously. In general, the only investigation conducted by Majic, who serves as respondent's EEO Officer, is to ask the alleged perpetrator of the discrimination if the allegations are true. If the allegations are denied, no further investigation is conducted.

22. Complainant had approximately seven jobs after May 22, 1984 with employers other than respondent.

23. Complainant was very embarrassed as a result of respondent's failure to hire him. At least in part, respondent's failure to hire complainant caused complainant to threaten suicide. The resulting financial problems, which followed respondent's failure to hire complainant, caused complainant's relationships with his wife and children to become strained. Complainant became withdrawn and would not communicate with anyone, including his family.

24. Complainant expended $2,147.09 in costs reasonably necessary for the litigation of this matter.

25. Complainant's attorney Karlin reasonably expended 212.8 hours in representing complainant in this matter.

26. Complainant's attorney Hayes reasonably expended 175.3 hours in representing complainant in this matter.

27. Reasonable hourly rates for the legal services rendered by complainant's attorneys in this matter are $150.00 per hour for Karlin and $100.00 per hour for Hayes.

CONCLUSIONS OF LAW

1. Garry Freeman is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, Section 5-11-10.

2. Southern Ohio Coal Company 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.

3. Complainant has established a prima facie case that respondent discriminated against him on the basis of his race by failing to hire him.

4. Complainant has shown that the reason articulated by respondent for failing to hire him is pretextual.

5. Respondent discriminated against complainant on the basis of his race in violation of West Virginia Code, Section 5-11-9(a) by terminating his employment.

DISCUSSION

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342-353 (WVa 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory

reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnel Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

Respondent contends in its brief that the holding in Conaway v. Eastern Associated Coal Corp. ___ S.E.2d ___ (W.Va. 1986) expresses dissatisfaction with and, therefore, rejects the previous holding of the Supreme Court of Appeals regarding what a complainant must prove to establish a prima facie case of discrimination as outlined in Shepherdstown Volunteer Fire Dept. v. Human Rights Commission, supra. Respondent has apparently misread the opinion in Conaway. The Conaway Court does note that the prima facie case formula set forth in Shepherdstown should not be mechanically applied to every fact situation, and the Court then goes on to illustrate that there are multiple methods which a complainant may employ to make out a prima facie case of discrimination. The Court's holding that the Shepherdstown prima facie case formula should not be mechanically applied to all factual situations is certainly not new law. Federal court decisions interpreting analogous federal anti-discrimination laws, to which the West Virginia Supreme Court of Appeals often refers as a body of helpful and relevant guidance, although not binding precedent, in interpreting the Human Rights Act,

have long held that a complainant may establish a prima facie case of discrimination by proving any set of facts which, if otherwise unexplained, raise an inference of discrimination. Furnco Construction Co. v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). Significantly, the Supreme Court of Appeals expressly held that it was expanding upon but not overruling or modifying its previous holdings regarding the possible elements of a prima facie case. Conaway, supra. The only significant change in the allocation of proof as set forth in Conaway is that the Supreme Court of Appeals appears to be requiring that a respondent show a reason for its action that the fact finder believes, as opposed to merely requiring that a reason be articulated. Conaway, supra, n. 11.

In the instant case, complainant has established a prima facie case of discrimination. The parties have stipulated that complainant is black, that he applied for a foreman position with respondent; that complainant had a valid foreman's certificate during the pendency of his application; that respondent did not hire complainant; and that respondent hired supervisors after complainants application. Complainant has proven that he was misled by respondent. Complainant testified that Zanussi, respondent's Personnel Supervisor at the Martinka Mine, told complainant that respondent was not hiring. Zanussi admitted during his testimony that he made this false statement to

complainant. Complainant has also established by a preponderance of the evidence that respondent hired eleven white supervisors while complainant's application was up to date. These facts are sufficient to establish a prima facie because, if otherwise unexplained, they raise an inference of discrimination.

Respondent has articulated a legitimate non-discriminatory reason for failing to hire complainant. Zanussi testified that he evaluated the applications for employment received by respondent and hired the applicants that he felt were the best qualified.

Complainant has demonstrated that the reason articulated by respondent is pretextual. The testimony of complainant and his witnesses was credible. The testimony of respondent's witnesses was not credible. The testimony of Zanussi, the person who made the decision not to hire complainant, was not credible because of a hesitant and evasive demeanor. Zanussi's credibility was impaired by several other problems. Zanussi testified that he had very little negative information about Jackson prior to his rehire by respondent, but he was forced to admit that his exit interview sheet for his previous employment with respondent indicates that Jackson was not recommended for rehire and that Zanussi's own interview sheet reveals that Jackson tends to stretch the truth. Zanussi testified that he had a telephone interview with complainant, but Zanussi failed to make a record of the interview as required by respondent. Zanussi testified that Conaway told him that complainant's experience as a foreman

at Bethlehem involved mostly construction work as opposed to the removal of coal, but Conaway denied having made this statement. Perhaps most importantly, Zanussi lied to both complainant and Dobbs, who is also black, regarding whether respondent was hiring. The testimony of Majic was also not credible because of a poor demeanor and because of a contradiction in his testimony. Majic testified that he had never worked with a particular form, but he admitted later in his testimony that he worked with said forms and that he was required to sign them.

Complainant has also shown pretext by demonstrating that he was more qualified than the persons actually employed by respondent as foremen in the relevant time period. Respondent seeks to arbitrarily restrict the evidence to a period of 90 days prior to the filing of the complaint. Such an arbitrary cut off for purposes of taking evidence, as opposed to the amount of time within which a complaint may be filed, would necessarily result in injustice. If complainant files a complaint within the statutory deadline, now 180 days, the Human Rights Commission has jurisdiction over the case, and the Commission is duty bound to consider all relevant evidence in determining whether the Human Rights Act has been violated. Obviously, there must be some time limit on how far back in time the parties can reach to prove their case, but that time limit must be made on a case-by-case basis. An arbitrary time limit so short

as that proposed by respondent would often preclude the Commission from reviewing highly relevant admissible evidence. Because a violation of the Human Rights Act is akin to an act of treason; undermining the very foundations of our democracy, Allen v. Human Rights Commission 324 S.E.2d 99 (W.Va. 1984), the short time frame proposed by respondent must be rejected.

In the instant case, the relevant time frame is from May 22, 1984 to the present, the period during which complainant's application for employment with respondent was current and up to date. Complainant had filed a previous application with respondent, but said application was the subject of a previous discrimination complaint by complainant which had already been resolved. Any hiring of foremen by respondent since May 22, 1984 is a relevant factor in this case.

During the relevant time period herein, respondent hired at least eleven white foremen. Complainant had had twelve years of mining experience, and he had acquired his mine foreman certificate papers on Nobember 1, 1978. Complainant had approximately 19 months experience as a foreman at his prior job in which he was classified as a construction supervisor but actually performed duties involving the removal of coal. In addition, complainant had four months experience as a fill-in foreman while he was still in the Union. Many of the white foremen hired by respondent were less qualified than complainant. Sweetnish, a white hired by respondent as a foreman, had only $10\frac{1}{2}$ months underground experience gained primarily during summer vacations.

Thomas, a white hired by respondent as a foreman, had approximately 17 months experience as a foreman, and Glass, a white hired by respondent as a belt foreman, had no previous supervisory experience. Each of these three individuals was less qualified than complainant for the foreman position. Respondent has concocted a number of ex post facto explanations to boost the "qualifications" of Sweetnish, Thomas and Glass, but the fact remains that Zanussi disqualified complainant from further consideration on the basis of insufficient production and supervisory experience. At the same time, Zanussi did not consider the lesser production and supervisory experience of these three white applicants to be a disqualification.

Complainant has also demonstrated pretext in several other ways. Complainant has proven that respondent records the race of its applicants directly on its interview sheets which are attached to the sheet that hiring decisions are made from. This practice violates West Virginia Code §5-11-9(b), and it is indicative of the race-conscious nature of respondent's employment decisions.

Moreover, complainant has shown that respondent's primary method of recruitment of employment is through word-of-mouth. This method of recruitment invites a discriminatory "good ole boy" hiring system.

Complainant has proven that Majic told black employee Jackson that respondent would hire more blacks if Hood, another black

employee, wasn't absent from work so much. This statement is significant because it reveals a stereotypical pattern of thinking. The underlying premise to the logic of this statement is that all blacks are the same. Thus, the syllogism continues, if one black employee has an attendance problem, the entire race will not report to work as scheduled and it would be a bad practice to hire any black. Obviously, such a system of stereotypical employment practices does not pass muster under the Human Rights Act.

Complainant has also demonstrated that at least on one occasion respondent's management tolerated racial name calling. Hood, a black employee testified that he was called "nigger" in front of a white supervisor, Porter. The supervisor did nothing to correct the racial name calling, but after the Union interceded, Hood received an apology.

Complainant has not demonstrated by the preponderance of the evidence that there is a pattern and practice of discrimination against blacks at respondent. All pending motions to admit documentary evidence consisting of discrimination complaints and related documents are hereby granted. Despite all of the post-hearing hoopla in this seemingly never-ending case, all that the evidence reveals is that an unusually large number of complaints of discrimination have been filed against respondent. Too little is known about any complaint to establish by a preponderance of the evidence that the complaint is or is not meritorious. The testimony of the expert statisticians in this matter is entirely

unhelpful. Respondent's statistician, Lehoczky, based his conclusion of no discrimination upon a statistical sample that is too small to be meaningful. Complainant's statistician, Hawley, based his conclusion of discrimination upon the unwarranted assumption that certain hires of black employees of respondent should not be credited. In lieu of these problems, the testimony of each hired expert statistician is accorded no weight. Even if one were to agree with the conclusion of respondent's statistician that respondents hiring numbers do not suggest discrimination, the outcome of this case would not be affected. The issue here, as in all cases alleging disparate treatment, is whether the individual complainant was discriminated against. Here the answer is clearly yes, and the answer does change merely because respondent has not generally discriminated.

The final factor proven by complainant which tends to demonstrate pretext is the cavalier manner in which respondent reacted to complaints of discrimination. Although the Hearing Examiner disagrees with complainant's contention that there is a pattern and practice of discrimination at respondent, the record is clear that there were an unusually large number of complaints of race discrimination lodged against respondent and the record is equally clear that respondent does not take these complaints seriously. The only investigations conducted by respondent's EEO officer, Majic, was to ask the alleged perpetrator of the discrimination if the allegations are true.

Especially in view of the very large number of complaints filed against respondent, this system of "investigating" allegations of discrimination is woefully inadequate.

RELIEF

Complainant is entitled to backpay as a remedy for respondent's unlawful discrimination. The parties have stipulated to the amount of backpay through March 1, 1987 for straight pay. To this figure should be added an amount for overtime pay. Because the parties have stipulated to the fact that complainant would have worked at least one shift of overtime per month, the figure one overtime shift per month should be added to the straight pay. This amount should be made current by adding the monthly amounts for straight pay and overtime for each month from March 1, 1987 to the date of the Commission's final order herein. Deducted from this amount should be the amount earned by complainant in the seven jobs he testified that he has held since May 22, 1984. For reasons that the Hearing Examiner does not understand, neither party offered any evidence as to the amount of income received by complainant for these jobs. Despite this hole in the record, this amount must be deducted from the backpay figure.

Complainant should be awarded substantial incidental damages for loss of dignity, humiliation, embarrassment and emotional distress caused by respondent's unlawful failure to hire him. Complainant and his spouse testified credibly that he was very

embarrassed by respondent's failure to hire him. At least in part, the discrimination caused complainant to contemplate and threaten suicide. The financial problems which resulted from the discrimination caused the relationship between complainant and his wife and children to become strained. Complainant became withdrawn and would not communicate with anyone, including his family.

Complainant is also entitled to be awarded his reasonable attorney's fees. Respondent has filed an additional brief in opposition to the attorneys fees requested especially insofar as the hourly rates sought by complainant's attorneys. The Hearing Examiner has reviewed all written materials submitted by the parties and has concluded that the hourly rates sought by counsel for complainant, $150 for Karlin and $100 for Hayes, are extremely reasonable. All of the relevant factors as set forth in the documents filed by each party have been considered, but two are particularly relevant. First, the level of skill demonstrated by counsel for complainant was very high. The quality of the legal services rendered by complainant's attorneys is excellent. The Hearing Examiner has presided over approximately 175 human rights hearings in two jurisdictions, and the skill and ability demonstrated by complainant's attorney Karlin is within the top five seen by the Hearing Examiner. Although Hayes may only have been practicing law for a short time, her skill is very impressive, and her previous training and experience

in counseling obviously helped her in developing the testimony in this case regarding incidental damages. The quality of legal work by the lawyers for both parties in this case was excellent. Second, there is a contingency factor involved in plaintiffs attorneys obtaining full attorney's fees. Because only prevailing complainants are awarded attorneys fees, there was a contingency nature as to whether complainant's lawyers would receive their fees from respondent. Respondent argues apparently that complainant's lawyers should be limited to the hourly fees received by counsel for respondent. Respondent's argument is rejected. There is a contengency nature to the fees of complainant's attorneys. This contingency nature is clearly absent from the fees of counsel for respondent. The difficult burden of proof upon complainant's in these cases magnifies the uncertainty and risk for counsel. It would be most unfortunate if the Commission were not to allow a reasonable hourly rate for good attorneys who represent complainants. Such an action would certainly have a chilling effect upon quality attorneys.

In terms of the hours claimed by counsel for complainant, the Hearing Examiner is tempted to deny the attorney hours that were expended after the evidentiary depositions of the statisticians. The parties delayed the closing of the record in this case for months. The only purpose of the delay was to offer additional exhibits regarding other complaints filed against respondent. Although these complaints are relevant

inasmuch as respondent did not take them seriously, see previous discussion on the issue of pretext, complainant did not establish a pattern and practice of discrimination. Respondent, on the other hand, failed to adequately provide certain complaints which were properly requested in discovery. Complainants request for sanctions as a result of this discovery abuse is denied, but it is clear that respondent's failure to properly and timely respond to the discovery request was at least partially responsible for the long delay in closing the record. Accordingly, it would be improper to penalize only complainant, and the Hearing Examiner finds that even the hours of attorney time during this wild goose chase after the hearing are reasonable in view of the unusual circumstances of this case.

PROPOSED ORDER

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

1. That the complaint of Garry Freeman, Docket No. ER-201-86, be sustained.

2. That respondent hire complainant as a foreman at a rate of pay comparable to what he would be receiving but for the discriminatory failure to hire.

3. That respondent pay complainant a sum equal to the wages he would have earned but for respondent's unlawful failure to hire him. Such wages for the period to March 1, 1987 would have been $66,402.00 for regular wages, and to this sum should be added the sum of $3,052.72 per month for overtime wages. Subtracted

from this sum should be the total amount of income that complainant has received since May 22, 1984. Respondent should also be ordered to pay complainant interest on the back pay owed him at the statutory rate of ten percent.

4. That respondent pay to complainant the sum of $7,500.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory failure to hire.

5. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of $49,450.00.

6. That respondent be ordered to pay complainant the sum of $2,147.09 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter.

7. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their race in making employment decisions.

8. That respondent report to the Commission within thirty days of the entry of the Commission's Order, the steps taken to comply with the Order.

James Gerl
Hearing Examiner

ENTERED: January 8, 1988

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

GARRY FREEMAN,

Complainant,

vs. DOCKET NO. ER-201-86

SOUTHERN OHIO COAL COMPANY,

Respondent.

SUPPLEMENTAL
PROPOSED ORDER AND DECISION

This matter is before the Hearing Examiner pursuant to the remand by the Human Rights Commission. The Hearing Examiner's Proposed Order and Decision was entered on January 8, 1988. The Order of Remand was entered on May 25, 1988. The Executive Director of the Human Rights Commission has failed to provide the official record to the Hearing Examiner. The parties submitted a proposed Stipulation to the Hearing Examiner on October 8, 1988.

DISCUSSION

The Order of Remand directed the Hearing Examiner to engage in further calculations with regard to backpay and to obtain submissions from the parties regarding said calculations or else to adopt complainant's calculations. The parties began work upon a stipulation within six days of the entry of the Order of Remand, but they were frustrated by a lack of cooperation by the State Tax

Commissioner. After the issuance of a subpoena was threatened, the Tax Commissioner submitted the necessary documents, and the parties submitted a Proposed Stipulation which sets forth eight separate proposed stipulations of fact. The Hearing Examiner finds said proposed stipulations to be acceptable and hereby recommends that the original Proposed Order and Decision be amended to include each of the eight proposed stipulations as findings of fact nos. 28 through 35. The Commission's attention is directed especially to proposed stipulations nos. 5 and 8 regarding the calculation of backpay and finding no. 6 regarding attorney's fees. The parties proposed stipulation is attached hereto and incorporated by reference herein.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends that in addition to the changes already made by the Commission, the original Proposed Order and Decision be amended as aforesaid.

James Gerl
Hearing Examiner

ENTERED: October 10, 1988

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GARRY FREEMAN,

Complainant,

vs. DOCKET NO. ER-201-86

SOUTHERN OHIO COAL COMPANY,

Respondent.

PROPOSED STIPULATION

1. As of July 31, 1985, the salary for an entry level inby supervisor at Southern Ohio Coal Company's Martinka Mine was $3,408.00 per month. Effective April 1, 1986, the salary for said position was increased to $3,558.00 per month. Effective April 1, 1987, the salary for said position was increased to $3,733.00 per month. Effective April 1, 1988, Southern Ohio Coal Company implemented a Merit Review Plan rather than an across-the-board increase.

2. Had Garry Freeman been hired by Southern Ohio Coal Company and such employment continued, he would have earned $137,154.00 in regular wages from August 1, 1985, through October 1, 1988, calculated as follows:

Aug. 1 - Dec. 31, 1985 @ $3,408/mo.	$ 17,040.00
Jan. 1 - Mar. 31, 1986 @ $3,408/mo.	$ 10,224.00
Apr. 1 - Dec. 31, 1986 @ $3,558/mo.	$ 32,022.00
Jan. 1 - Mar. 31, 1987 @ $3,558/mo.	$ 10,674.00
Apr. 1 - Dec. 31, 1987 @ $3,733/mo.	$ 33,597.00
Jan. 1 - Oct. 1, 1988 @ $3,733/mo.	$ 33,597.00
Aug. 1, 1985, thru Oct. 1, 1988 . . TOTAL	$137,154.00

3. Had Garry Freeman been hired by Southern Ohio Coal Company and such employment continued, he would have earned

$8,294.11 in overtime wages from August 1, 1985, through October 1, 1988:

August 1, 1985 - March 1, 1987	$ 3,052.72
March 1, 1987 - March 31, 1987 (1.5 days/month)	$ 249.81
April 1, 1987 - March 31, 1988	$ 3,101.58
April 1, 1988 - October 1, 1988 (1.5 days/month)	$ 1,890.00
TOTAL	$ 8,294.11

4. Interim hearings for the period August 1, 1985, through October 1, 1988, total $31,522.33, calculated as follows:

1985	
City of Morgantown, WV	$ 5,848.88
1986	
Welch, WV	$ 216.00
A. C. Davis	$ 480.00
"Brother Allen"	$ 200.00
Manchin Clinic	$ 1,075.00
March-Westin Co., Inc.	$ 5,919.95
1987	
Manchin Clinic	$ 318.18
United Parcel Service, Inc.	$ 6,859.88
National Mine Service, Inc.	$ 1,354.16
1988	
Rivesville Karate Studio	$ 318.18
Browning Ferris Industries of W.Va., Inc. (through 9/3/88)	$ 3,070.06
United Parcel Service, Inc. (through 9/10/88)	$ 5,866.04
Interim Earnings August 31, 1985 through October 1, 1988 . . . . . TOTAL	$ 31,522.33

5. The total amount of back pay, less interim earnings, is $113,925.78.

6. If Garry Freeman prevails, Allan N. Karlin is entitled to additional attorney fees in the amount of $300.00.

7. If Garry Freeman is also entitled to prejudgment interest such amount will be determined by the parties if he prevails in his case.

8. If Garry Freeman were working for Southern Ohio Coal Company, he would continue to earn $3,733.00/month plus one day of overtime each month at $180.00/month.

JOSEPH M. PRICE

WILLIAM E. ROBINSON

ROBINSON & McELWEE
Post Office Box 1791
Charleston, WV 25326

Counsel for Respondent

ALLAN N. KARLIN

ATTORNEY AT LAW
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Counsel for Complainant