



COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301

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ARCH A. MOORE, JR.
Governor

January 17, 1986

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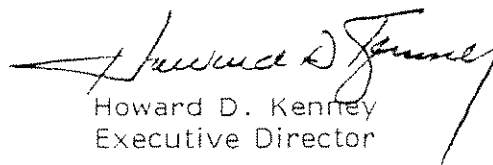
RE: Marguerite Francisco & Virginia Lucas/
V Food Store Employees Union/Local 347 & Thorofare Markets
EA-369-79/ES-368-79/EA-363-79 & ES-362-79

Dear Mr. Kelly, Mr. Cairns, Ms. Norton and Mr. Logsdon:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Marguerite Francisco & Virginia Lucas V Food Store Employees Union, Local 347 & Thorofare Markets, Inc. EA-369-79, ES-368-79 & EA-363-79

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

Sincerely yours,



Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARGUERITE FRANCISCO &
VIRGINIA LUCAS,
COMPLAINANT,

V.

DOCKET NO.: EA-369-79
ES-368-79
EA-363-79
ES-362-79


FOOD STORE EMPLOYEES UNION
LOCAL 347 AND THOROFARE MARKETS, Inc.,
RESPONDENTS.

ORDER

On the 9th day of January 1986, the West Virginia Human Rights Commission had before it's consideration the Complainant's Motion for Reconsideration. The Motion for Reconsideration is hereby ordered denied.

By this Order, a copy of which is to be sent by Certified Mail, the parties are hereby notified that they have the right to judicial review.

Entered this 15 day of January, 1986.



CHAIR/VICE CHAIR
WEST VIRGINIA HUMAN RIGHTS
COMMISSION



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

October 30, 1985

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Re: Marguerite Francisco & Virginia Lucas
V
Food Store Employees Union,
Local 347 & Thorofare Markets, Inc.

EA-369-79
ES-368-79
EA-363-79
ES-362-79

Dear Above Parties:

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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARGUERITE FRANCISCO AND
VIRGINIA LUCAS
COMPLAINANTS,
V.

DOCKET NOS.: EA-369-79
ES-368-79
EA-363-79
ES-362-79

FOOD STORE EMPLOYEES UNION,
LOCAL 347 AND THOROFARE MARKETS, INC.
RESPONDENTS.

ORDER

At its regular meetings of August 1985 and September 1985, the West Virginia Human Rights Commission had before it and considered the following: the Examiner's Recommended Findings of Fact and Conclusions of Law; Respondent Union's Motion to Dismiss the Hearing Examiner's Recommended Finding of Fact and Conclusion of Law; Respondent Thorofare's Motion to Strike the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Relief; the Exceptions to the Hearing Examiner's Recommendation filed by both complainants and both respondents; the Hearing Examiner's Order for costs and expenses; Respondent Union's Exceptions to the Hearing Examiner's Order for Attorneys Fees and Costs; Respondent Thorofare's Motion to Strike the Hearing Examiner's Order for Attorney's Fees and Expenses; Mike Kelly's letter of July 18, 1985; Donald J. Cairns' letter of July 22, 1985; Donald G. Logsdon's letters of July 19, 1985, and August 12, 1985.

The West Virginia Human Rights Commission rejects the Hearing Examiner's recommendations and does hereby make its own Order.

These matters had matured for public hearing on February 22, 1983, and concluded on December 13th thru the 15th, 1984, being held at the John Ray Conference Room, Kanawha County Library, Charleston, WV and the Conference Room, West Virginia Human Rights Commission, Charleston, WV, respectively. On February 22, 1983, the Complainants, Marguerite Francisco and Virginia Lucas were represented by Eunice L. Green, Assistant Attorney General. The Respondent, Thorofare Markets, Inc., was represented by Gary A. Marsack, Esq. The Respondent, Food Store Employees Union, Local 347 was represented by Donald G. Logsdon. During the December proceedings the Complainants were represented by Mike Kelly. The Respondent, Thorofare Markets, Inc., was represented by Donald J. Cairns. The Respondent, Food Store Employees Union, Local 347 was represented by Donald G. Logsdon. The hearing panel consisted of Theodore R. Dues, Jr., as Hearing Examiner and the Honorable Russell VanCleve as Hearing Commissioner.

In the case of Marguerite Francisco the Commission finds:

1. The Complainant is a female who, at the time of the alleged discriminatory acts, was 51 years of age.
2. Marguerite Francisco began her employment career in the retail grocery business in 1947.
3. That all times relevant to the allegations in her complaint, Marguerite Francisco, was a member of the Respondent Union.
4. Marguerite Francisco became an employee of the Respondent, more particularly TMI-Pennyfare in 1964.

5. In 1964 Marguerite Francisco bumped to the Pennyfare Store in St. Albans.

6. Marguerite Francisco was not qualified for any of the full-time positions available at First Stop. Francisco was not a Journeyman Meatcutter. She never filled in on a temporary basis in any of these four (4) positions and never performed the full range of duties involved in those positions. Francisco had also never ordered products or supervised employees.

7. Marguerite Francisco's last position with the Respondent was as a meat wrapper.

In the case of Virginia Lucas the Commission finds:

8. Virginia Lucas began her employment career in the retail grocery business in 1951.

9. That all times relevant to the allegations in her complaint, Virginia Lucas was a member of the Respondent Union.

10. Virginia Lucas became an employee of the Respondent, more particularly TMI-Pennyfare in 1964.

11. In 1964, Virginia Lucas concluded her employment with Evans grovery.

12. Virginia Lucas was qualified due to experience to order dairy foods, check outside vendors and help unload trucks.

13. Virginia Lucas' last position with the Respondent was as a Head Dairy Clerk.

The Commission makes the following findings in both the Marguerite Francisco and Virginia Lucas cases:

14. Thorofare Markets, Inc. formerly an Employer engaged in the retail grocery business in West Virginia, Ohio and Pennsylvania,

operated retail grocery stores under three (3) separate divisions: (a) Thorofare Markets; (b) Pennyfare; and(c) First Stop. A Pennyfare store located in St. Albans, West Virginia closed on January 13, 1979, and a new First Stop store was thereafter established at the former Pennyfare location. This store closed on March 8, 1980, and all remaining retail stores (three divisions) closed on or before April 30, 1982.

15. The Pennyfare Store relevant to the proceedings hereto was situate in St. Albans, Kanawha County, West Virginia.

16. In December, 1978, an irrevocable decision was made by management to close the Pennyfare, St. Albans location, which did close on January 13, 1979. Certain former Pennyfare employees remained working in the St. Albans location after the store was closed to clean and ready the facility for a new operation.

17. Pennyfare employees had no contractual right through their collective bargaining agreement to jobs at Thorofare Market stores or at First Stop stores. Both the Thorofare Markets decision and the First Stop decision were covered by collective bargaining agreements separate and apart from the Pennyfare agreement.

18. The Respondent Union, for all times relevant to the allegations of this complaint, was the legal collective bargaining agent for non-management Thorofare-Pennyfare employees, including the Complainants.

19. The Respondent Union was the authorized bargaining agent for the employees including the Complainants, working at the St. Albans, West Virginia store for all times relevant to the matters herein including other stores in southern West Virginia and certain parts of Ohio.

20. Thorofare Markets, Inc. first investigated the box store concept in 1977. After the remodeling of the Pennyfare, St. Albans store failed to increase sales, Thorofare Markets undertook a study to determine the feasibility of a box store in St. Albans. The study was completed in late 1978. Thorofare Markets determined that a box store was feasible provided an agreement could be reached regarding acceptable wage rates. Negotiations were held with Local 347 on January 11, 1979, and thereafter, and as a result of those negotiations a collective bargaining agreement covering First Stop employees was executed. On January 12 or 13, 1979, the final decision to open First Stop in St. Albans was made. First Stop opened to the public on or about January 29, 1979.

21. The concept of a box store requires that costs be kept to a minimum. In light of that requirement, Thorofare Markets made a decision to employ part-time help to the greatest possible extent. It was determined that four (4) positions were key to the success of a First Stop store. These positions were: Meat Manager, Produce Manager and Head Stock Clerk. Thorofare Markets determined that the Head Dairy Clerk and Assistant Store Manager positions were not needed at First Stop. In Thorofare Markets, the dairy duties were performed by stockboys and there were no Head Dairy Clerks. In First Stop the dairy was significantly smaller and simpler.

22. On January 5, 1979, Thorofare Markets told Local 347 that it was considering the possibility of opening a First Stop store. Local 347 was also told that Thorofare Markets wanted to pay minimum wages to part-time First Stop employees. Thorofare Markets and Local 347 agreed to meet on January 11, 1979, to bargain over wages, benefits

and conditions of employment for First Stop employees. As of January 7, 1979, the only information available was that part-time employees would be paid minimum wage at First Stop under the Employer's initial plan.

23. Virginia Lucas was not qualified for any of the four (4) full-time positions at First Stop. The Meat Manager and Assistant Meat Manager required Journeyman Meatcutters and Lucas was not a Journeyman Meatcutter. Lucas had never filled in on a temporary basis for the Head Stock Clerk, Produce Manager, Meat Manager or Assistant Meat Manager. She had never performed a full range of duties involved in those positions. Also, while the Produce Manager was compensated on the basis of produce sales, the Head Dairy Clerk's compensation was based solely on an hourly rate.

24. As of January 1, 1979, at Pennyfare, St. Albans, Joe Byrd was the Meat Manager, Fred Gertz was the Assistant Meat Manager, Thomas Knight was the Produce Manager and Dallas Templeton was the Head Stock Clerk. All four (4) of these individuals were performing their jobs in an excellent manner. These four (4) individuals were better qualified and more experienced than Virginia Lucas or Marguerite Francisco. It was necessary to have individuals in those four (4) key positions who would provide an adequate level of performance to operate the new First Stop store as of the time that it opened in January, 1979. In order to meet these business needs, Thorofare Markets approached the occupants of those four (4) positions and told them they would be offered similar positions with First Stop if a First Stop Market opened.

25. The Meat Manager, Assistant Meat Manager, Head Stock Clerk, Produce Manager and Head Dairy Clerk were classified positions

under the Pennyfare collective bargaining agreement. A person in a lower or different classification could not use his seniority to bump into a classified position. Moreover, while the agreement contained bidding procedures for classified positions in cases of vacancies, the existing Pennyfare agreement was not applicable to First Stop. The positions were filled with the most senior qualified applicant. Virginia Lucas and Marguerite Francisco were not prevented from bidding on any classified position during their employment.

26. Virginia Lucas and Marguerite Francisco never applied for full-time or part-time employment at First Stop. They never made any inquiry about such employment. Both Complainants indicated their disinterest in part-time employment at minimum wage on January 7, 1979. At a Union meeting on January 7, 1979, both Complainants indicated to Jack Brooks that they were accepting the four thousand dollar (\$4,000) bonus in lieu of exercising their seniority rights to bump into another Pennyfare store. This election by the Complainants was communicated to the Employer. No further communications from the Complainants were made to the Employer. No further communications from the Complainants or anyone representing the complainants were made to the employer. The Employer, Thorofare Markets, considered the Complainants to have resigned their employment.

27. The collective bargaining agreement in effect at the time of the St. Albans Store closing provided the Complainant with the right to bump, as a result of her seniority, into any other Pennyfare Store covered by the contract.

28. In addition the contract provided that all full-time employees had seniority over all part-time employees, regardless of length of service.

29. The contract further provided that a full-time employee involuntarily reduced to part-time employment would continue to be paid at the wage rate comparable to full-time hourly with no loss in seniority.

30. Paul Witkosky, Pennyfare District Manager, informed the Union of the Pennyfare, St. Albans closing and set up the meeting between Company and Union representatives to discuss the effects of the closing. Paul Witkosky delivered a notice of closing to the Pennyfare, St. Albans store and Virginia Lucas posted that notice.

31. The meeting on January 5, 1979, in Parkersburg, West Virginia was held for the purpose of discussing the effects of the closing of the Pennyfare, St. Albans store since an irrevocable decision to close the store had been made. During these negotiations, the Union proposed that a bonus be provided to employees who did not wish to bump and also proposed that five (5) additional positions be created in existing stores. Thorofare Markets and Local 347 finally agreed to create two (2) extra positions, one at the Smithers Pennyfare and the second at the Point Pleasant Pennyfare. They further acknowledged that employees could exercise their full bumping rights under the collective bargaining agreement. Finally, they agreed that all full-time employees over age fifty (50) had an additional option to accept a bonus of between two thousand dollars (\$2,000) and four thousand dollars (\$4,000), depending upon the years remaining until retirement, in lieu of exercising their right to bump into other Pennyfare stores. At the close of that meeting a Thorofare representative mentioned the possibility of opening a box store in the St. Albans location, but only if the Employer and the Union were able to negotiate an acceptable level of wages and benefits for box store employees. Thorofare Markets

indicated that minimum wage for part-time employees would be necessary in a box store, and that only four (4) positions, the key positions of meat manager, assistant meat manager, produce manager and head stock clerk, would be filled on a full-time basis.

32. The Pennyfare collective bargaining agreement provided that when a store closed, employees could exercise their seniority to bump into other Pennyfare stores. Under that agreement, if an employee did not exercise the right to bump or did not have sufficient seniority to bump another employee in a different store, they would be laid off. The two thousand dollar (\$2,000) to four thousand dollar (\$4,000) bonus option for full-time employees over age fifty (50) as well as the two (2) positions to be stuffed, were additional benefits negotiated for the Pennyfare, St. Albans employees as a result of bargaining on January 5, 1979. Thorofare Markets, Inc. agreed to these benefits in recognition of the forty-four (44) to sixty-eight (68) mile distance from St. Albans to other Pennyfare stores in West Virginia, of the family obligations of their employees, and in recognition of the many years of service by these employees.

33. A notice was posted at Pennyfare, St. Albans to inform the employees of a Union meeting on January 7, 1979. The meeting was held to discuss the closing of the Pennyfare, St. Albans store. Jack Brooks presided over the meeting and communicated to the employees the agreement reached during bargaining on January 5, 1979. Pennyfare, St. Albans employees were told that the store was closing and that they had the right to bump wherever their seniority could take them. They were informed of the two (2) positions being added and the bonus option for full-time employees over age fifty (50).

During the course of the meeting, members were talking among themselves and there was confusion. Employee names were read in order of the seniority and they were given their choice of their available options. Ina Holder elected to bump to Smithers. Gloria Wilkinson (Russel) elected to bump to Smithers. She later changed her mind and bumped to Point Pleasant. Marguerite Francisco elected to accept the bonus money and not exercise her seniority rights. Virginia Edens also elected the bonus money. Virginia Lucas elected to accept the bonus money and not to exercise her seniority rights. Jack Brooks mentioned the possibility of a new store in St. Albans if an agreement could be reached regarding wages and benefits. He indicated that the Employer wanted to pay minimum wages to part-time employees.

34. A meeting between representatives of Thorofare Markets and Local 347 was held in Parkersburg, West Virginia on January 11, 1979. The purpose of the meeting was to negotiate a First Stop agreement. The parties were able to agree on certain economic terms. They subsequently agreed on noneconomic matters. New First Stop employees were to be paid slightly over the minimum wage. Former Pennyfare employees on the Pennyfare, St. Albans payroll as of January 13, 1979 would under the terms of the First Stop collective bargaining agreement, receive the same wages and benefits which they received as Pennyfare employees. The final decision to open the First Stop store was made after the January 11, 1979, meeting on January 12th or 13th.

35. After electing to accept the bonus money and not exercise her seniority rights, Virginia Lucas applied for and began drawing pension benefits. She also applied for and received unemployment compensation

for twenty-six (26) weeks and placed several applications during that time period. After her unemployment compensation ended, she never again made an attempt to find any employment. Virginia Lucas stopped looking for work in 1980 after her husband had a stroke and she began to take care of him. She is now assisting her husband and son in maintenance work.

36. After electing to accept the bonus option and not to exercise her seniority rights, Marguerite Francisco began drawing a pension. She applied for and received unemployment compensation for twenty-six (26) weeks. Ms. Francisco never filed any employment applications after she left employment with Pennyfare, St. Albans. She was also unavailable for work for two (2) weeks while she was in the hospital between January 1979, and April 1982.

Conclusions of Law Jointly Applying to the Cases of Marguerite Francisco and Virginia Lucas:

1. Virginia Lucas and Marguerite Francisco have failed to establish, by a preponderance of the evidence, that either Thorofare Markets, Inc. or Food Store Employees Union, Local 347 discriminated on the basis of age or sex in staffing the First Stop store. Both Complainants have failed to establish that full-time jobs were available for which they were qualified. They have also failed to establish that they were equally or more qualified than the individuals selected to fill the full-time positions at First Stop. Both Complainants have failed to establish that they were denied part-time employment or that full-time positions were eliminated for the purpose of excluding them from employment on the basis of age or sex.

2. Thorofare markets, Inc. has articulated legitimate and necessary business justifications for their decisions regarding which positions were necessary at First Stop on a full-time basis and which individuals were the best qualified for those positions. Thorofare Markets, Inc. has also articulated legitimate business reasons for staffing First Stop with part-time employees and for not including Virginia Lucas or Marguerite Francisco among those part-time employees. In this regard, Complainants cannot rely upon Respondent Thorofare's express invitation to department heads to work at First Stop and its failure to extend a similar invitation to Complainants as evidence of discrimination since neither Complainant possessed the skills necessary to perform the tasks of the crucial full-time positions being filled. Complainants may only rely upon Respondent's "solicitation" of former Pennyfare St. Albans hired on a part-time basis at First Stop, but Complainants have failed to establish any disparate treatment in this regard.

3. Virginia Lucas and Marguerite Francisco have failed to present any direct evidence of discriminatory intent by Thorofare Markets, Inc. in staffing full-time or part-time positions at First Stop. They have further failed to establish, by a preponderance of evidence, that the justifications for the decisions as articulated by Thorofare Markets were in any way pretextual.

4. The understanding negotiated between Thorofare Markets and Local 347 on January 5, 1979, was facially neutral and did not discriminate against the Complainants on the basis of age or sex.

5. Virginia Lucas and Marguerite Francisco have failed to establish, by a preponderance of evidence, a prima facie case that Thorofare Markets or Local 347 discriminated against the Complainants on the basis of age

or sex in the communication or implementation of the agreement as negotiated on January 5, 1979. The preponderance of evidence demonstrates that the agreement was communicated by Local 347 to the employees accurately as the facially neutral agreement which existed on January 5, 1979.

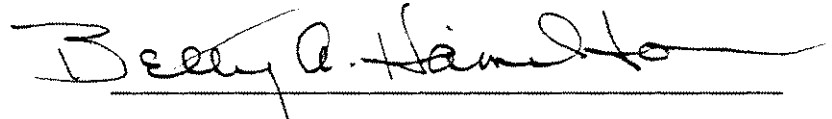
6. Thorofare Markets, Inc. reasonably relied upon Local 347, the collective bargaining representative of the Pennyfare, St. Albans employees, to communicate the facially neutral agreement to those employees.

7. The Complainants have failed to establish, by a preponderance of the evidence, that their bumping rights were in any way restricted or that they were in any way treated differently from other Pennyfare employees faced with a store closing. The Complainants have failed to present any direct evidence of discriminatory intent or purpose on behalf of Thorofare Markets or the Local 347.

8. Virginia Lucas and Marguerite Francisco voluntarily withdrew from the labor market on January 13, 1979. Neither Ms. Lucas nor Ms. Francisco made any efforts to find comparable employment after they finished collecting unemployment compensation twenty-six (26) weeks after January 13, 1979. Ms. Lucas was not available for work after her husband had a stroke in 1980. The Complainants have failed in their duty to exercise reasonable and diligent efforts to secure comparable employment and have, therefore, failed to mitigate their own damages.

9. The complainants shall take nothing. The Complaints herein are ORDERED dismissed with prejudice.

Entered this 28 day of October, 1985.



Chair/Vice-Chair
West Virginia Human
Rights Commission