STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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ARCH A. MOORE, JR
Governor

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June 12, 1987

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RE: Fain v. Leckie Smokeless Coal Co.
EA-507-86

Dear Parties:

Herewith, please find the 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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this order.

Sincerely,

Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

this article.

§5-11-11. Appeal and enforcement of commission orders.

(a) From any final order of the commission, an application for review may be prosecuted by either party to the supreme court of appeals within thirty days from the receipt thereof by the filing of a petition therefor to such court against the commission and the adverse party as respondents, and the clerk of such court shall notify each of the respondents and the commission of the filing of such petition. The commission shall, within ten days after receipt of such notice, file with the clerk of the court the record of the proceedings had before it, including all the evidence. The court or any judge thereof in vacation may thereupon determine whether or not a review shall be granted. And if granted to a nonresident of this state, he shall be required to execute and file with the clerk before such order or review shall become effective, a bond, with security to be approved by the clerk, conditioned to perform any judgment which may be awarded against him thereon. The commission may certify to the court and request its decision of any question of law arising upon the record, and withhold its further proceeding in the case, pending the decision of court on the certified question, or until notice that the court has declined to docket the same. If a review be granted or the certified question be docketed for hearing, the clerk shall notify the board and the parties litigant or their attorneys and the commission of the fact by mail. If a review be granted or the certified question docketed, the case shall be heard by the court in the manner provided for other cases.

The appeal procedure contained in this subsection shall be the exclusive means of review, notwithstanding the provisions of chapter twenty-nine-a of this code: *Provided*, That such exclusive means of review shall not apply to any case wherein an appeal or a petition for enforcement of a cease and desist order has been filed with a circuit court of this state prior to the first day of April, one thousand nine hundred eighty-seven.

(b) In the event that any person shall fail to obey a final order of the commission within thirty days after receipt of the same, or, if applicable, within thirty days after a final order of the supreme court of appeals, a party or the commission may seek an order from the circuit court for its enforcement. Such proceeding shall be initiated by the filing of a petition in said court, and served upon the respondent in the manner provided by law for the service of summons in civil actions; a hearing shall be held on such petition within sixty days of the date of service. The court may grant appropriate temporary relief, and shall make and enter upon the pleadings, testimony and proceedings such order as is necessary to enforce the order of the commission or supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VIRGIL W. FAIN,

Complainant,

v. DOCKET NO. EA-507-86

LECKIE SMOKELESS COAL CO.,

Respondent.

FINAL ORDER

On the 8th day of April, 1987, the Commission reviewed the Examiner's recommended findings of fact and conclusions of law in the above-captioned matter. After consideration of the aforementioned including exceptions thereto, the Commission does hereby adopt said recommended findings of fact and conclusions of law as its own with modifications and amendments set forth below.

Finding of Fact number 15 is deleted and substituted therefore is the following:

"15. Given the seniority process for the time period relevant to this matter, the seniority list for surface foremen was: Larry Poffenbarger, born in 1947, salaried in 1975; Austin McMillion, born in 1943, salaried in 1978; Dana Cox, born in 1931, salaried in July of 1979; and complainant, Virgil Fain. Austin McMillion was not laid off in November of 1982 because he was also on of respondent's superintendents."

Conclusion of Law number 2 is deleted and substituted therefore is the following:

"2. The evidentiary standards of proof in a discrimination action involving an alleged failure to recall can be compared, with necessary adaptation, to those governing alleged failures to hire. See Frankie v. AVCO Corp., 538 F. Supp. 250 (D. Conn. 1982)."

Conclusion of Law number 4 is deleted and substituted therefore is the following:

"4. In an age discrimination case, the ultimate burden remains with the complainant to prove, by a preponderance of the evidence, that she or he was discriminated against because of age. Cuddy v. Carman, 694 F.2d 853 (D.C. Cir. 1982); Shepherdstown, supra."

Conclusion of Law number 7 is modified by striking all remaining language therein following the sentence "Moreover as noted above, there is no evidence that respondent's recall policy disparately impacted all of the workers, nor was there any evidence that respondent's neutral recall and retention policy perpetuated prior discrimatory practices. WVHRC v. UTU, supra."

Conclusions of law number 13 is modified by striking all remaining language therein following the sentence "The allegations were not credible."

Conclusion of law number 15 is modified by striking the words "nor can he prove" from that paragraph.

It is hereby ORDERED that the Examiner's recommended findings of fact and conclusions of law be attached hereto and made a part of this order except as amended by this order.

By this ORDER a copy which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request reconsideration of this order and that they have the right to judicial review.

Entered this 11th day of June, 1987.

RESPECTFULLY SUBMITTED,

BY Bettie G. Hamilton
CHAIR/VICE CHAIR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VIRGIL W. FAIN,

Complainant,

v. DOCKET NO.: EA-507-86

LECKIE SMOKELESS COAL CO.,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 18th and 19th of November, 1986. The hearing was held in the Rupert Community Center, Rupert City Hall, Main Street, Rupert, West Virginia. The hearing panel on each day consisted of Theodore R. Dues, Jr., Hearing Examiner and Russell Van Cleve, Hearing Commissioner.

The Complainant appeared in person and by his counsel, Heidi A. Kossuth. The Respondent appeared by its representative, Joseph Turley and by its counsel, Roger A. Wolfe and L. Anthony George.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighting the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of

law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to these findings and conclusions, the same are rejected.

ISSUES

1. Whether the Complainant's age was a determining factor which motivated, the Respondent from recalling the Complainant from his 1982 layoff?

2. If so, to what relief is the Complainant entitled?

FINDINGS OF FACT

1. The Complainant is sixty-one (61) years of age.

2. The Complainant was hired by the Respondent in October of 1974 as a laborer.

3. In January, 1980, the Complainant became a salaried surface mine foreman.

4. The Respondent is a coal mining company, operating both surface and deep mines.

5. At the time the Complainant was made a salaried surface foreman, his previous experience included being an electrician, a car dropper and loader, a cat truck operator, a greaser and a dozer operator.

6. In addition to his experience, at the time the Complainant was made a salaried foreman, he held certificates for an under ground miner, surface foreman and emergency medical technician.

7. The Complainant performed his duties as a foreman in a satisfactory manner.

8. The Complainant's experience as a foreman was restricted to the surface or "the strip".

9. The Complainant was laid off with all other foreman and union personnel on November 30, 1982, as a result of a company wide layoff and shutdown of all production.

10. During this layoff and shut down of production, Respondent retained only its superintendents, including the surface superintendent.

11. The Complainant is of the opinion that the layoff itself was handled fairly by the Respondent.

12. After the November 30, 1982, layoff the Complainant was never recalled by Respondent.

13. During the relevant time period, Respondent had no employee handbook for salaried employees and no written policy regarding layoff and recall of salaried employees. The practice of the Respondent, in this regard, was to follow the procedures outlined in the United Mine Workers Association collective bargaining agreement. Accordingly, it was the practice of the Respondent to obtain the most senior employee qualified to perform the work needing to be performed.

14. The Respondent defined "seniority" as being salaried seniority rather than company seniority: that is, seniority for layoff and recall purposes began from the date the employee became a salaried employee, rather then from the original date of hire.

15. Given this seniority process, for the time period relevant to this matter, the seniority list for surface foreman

relevant to this matter, the seniority list for surface foremen was: Larry Puffenbarger, Austin McMillion, Dana Cox and Complainant, respectively.

16. Larry Puffenbarger took a leave of absence for personal reasons from the employment of the Respondent on July 10, 1981, with the understanding with management that he would return to the employment of the Respondent at such time that operations began on the new Smokehouse strip.

17. Accordingly, the Respondent notified the Pension Fund in 1981 that Mr. Puffenbarger had been on a leave of absence and that his participant time in the plan was to continue uninterrupted. Also Mr. Puffenbarger was continually covered under Respondent's health plan under his leave of absence.

18. Respondent had granted such leave of absence to another employee at least on one other occasion prior to Mr. Puffenbarger.

19. Upon his return to employment after his leave of absence, Larry Puffenbarger was referred to a physician for a physical examination due to the lack of any prior medical information on him from his initial hiring and to ensure that Mr. Puffenbarger had not incurred a potentially compensable injury during his interim employment.

20. The physical which Mr. Puffenbarger was required to take did not entail all of the specific tests that are normally required in conjunction with a preemployment physical.

21. At no time did Mr. Puffenbarger inform Mr. Fain that he had quit his job with the Respondent.

22. In March of 1986, Larry Puffenbarger resigned his position with Respondent.

23. At that time, Respondent had reached an improvement in the method of loading and cleaning coal and realized a corresponding decline in the volume of coal it shipped. For this reason, Respondent made a decision to realign Austin McMillion to Larry Puffenbarger's position as full time surface foreman and to apportion his loadout and central shop responsibilities among existing employees.

24. After this realignment, McMillion continued to perform many of his former responsibilities, including responsibility for all electrical work.

25. The Complainant's certification, as mentioned earlier, was limited and did not include certification to perform this area of supervision.

26. Accordingly, McMillion was the most senior person on the seniority list for the foreman that was qualified to perform both the surface foreman and electrical duties.

27. Dana Cox was laid off at the same time as the Complainant and has not been recalled.

28. Dana Cox has more seniority according to the procedure used by the Respondent than the Complainant.

29. The Complainant inquired of the Respondent on four occasions as to when they would be returning to work.

30. The Complainant's employment inquiries of management pertained to when he could return to his former position and did not encompass a position involving nonsupervisory duties or any

significant reduction in pay from that he received at the time of his layoff.

31. The Respondent, since Complainant's layoff, has hired several mine clerks. The mine clerk position paid a significantly lesser salary than that received by the Complainant at the time of his layoff and did not involve supervisory duties.

32. At the time of the Complainant's layoff he received an annual salary of $37,900.

33. The position of equipment coordinator is a salaried position which involves no supervision of employees.

34. The position was initially offered to a union miner who refused the position. The position was never filled.

35. At no time did management for Respondent make direct or indirect reference to Complainant's age. However, subordinates of Complainant did refer to him on occasion as "old man" and "dad".

36. The subordinates references to the Complainant's age were virtually ignored by Complainant and by his representations he got along well with everyone employed by Respondent during his tenure.

37. Richard Cales, a union employee, had previously indicated his intention to retire. As a follow up to Mr. Cales' expressed intention, management of Respondent inquired as to when Mr. Cales would be seeking to implement his retirement decision.

38. David Long, a union employee, was not informed that management would contact him if a salaried position became available.

39. At no time for the relevant time period did management express an unwillingness of coal companies to hire older persons. In fact, the evidence reflects that persons older than the Complainant were actively retained and employed by Respondent in management positions.

DISCUSSION

The Complainant was laid off, as was all other peer foreman and union personnel, due to a company wide layoff and shutdown of all production. During this period the Respondent made certain management decisions which involved recalling salaried foremen to perform the work needed on a seniority/qualified basis.

Those persons actually recalled were more salaried senior to the Complainant in the case of Mr. Puffenbarger, and, more qualified in the case of Mr. McMillion.

The Complainant inquired on four occasions of management as to when they would return to work. This was reasonably interpreted by management to mean when was the Complainant going to be capable of returning to his former position as a surface foreman supervising a crew. The Complainant's own testimony at the hearing, and at his earlier taken deposition was that "it depended upon what they were offering", in response to whether he was seeking reinstatement.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has

jurisdiction over the parties and the subject matter herein.

2. The evidentiary standards of proof in a discrimination action involving an alleged failure to recall are identical to those governing alleged failures to hire. See, e.g., Franci v. Avco Corp., Avco Lycoming Division, 538 F.Supp. 250 (D. Conn. 1982).

3. For discrimination actions involving an alleged failure to hire, the West Virginia Supreme Court has adopted the evidentiary standards of proof set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981):

> We adopt the framework of Green and its progeny and hold that in an action to redress unlawful discriminatory practices in employment . . . under the West Virginia Human Rights Act . . ., the burden is upon the Complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the Complainant belongs to a protected group under the statute; (2) that he/she applied and was qualified for the position or opening; (3) that he/she was rejected despite his/her qualifications: and (4) that after the rejection, the Respondent continued to accept the applications of similarly qualified persons. If the Complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the Respondent to offer some legitimate and nondiscriminatory reason for the rejection. Should the Respondent succeed in rebutting the presumption of discrimination, then the Complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the Respondent were merely a pretext for the unlawful discrimination.

Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983). See also, West Virginia Human Rights Commission and Rose Bradsher v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (W.Va. 1985).

4. In an age discrimination case, the ultimate burden remains with the Plaintiff to prove by a preponderance of the evidence that, "but for" his age, he would have been hired. E.E.O.C. v. Western Electric Co., 713 F.2d 1011 (4th Cir. 1983); Conaway v. Eastern Associated Coal Corp., No. 16969 (W.Va December 9, 1986) (incorporating "but for" test into Plaintiff's prima facie case).

5. At the hearing, the Complainant offered evidence on the following issues: the realignment of Austin McMillion in 1986; the recall of Larry Puffenbarger in 1983; the recall of Joe Bill Buckberry in 1983; the recall of two employees to the warehouse; the hiring of four mine clerks in the period following Complainant's layoff; the offering of the maintenance coordinator position to Larry Owens; and the discussion of the surface foreman position with Gary Daniels. These issues will be addressed seriatim below. Before doing so, however, this Hearing Examiner notes that disparate impact, as distinguished from disparate treatment, was not at issue in this case, and no evidence was offered to suggest that any of Respondent's employment policies or practices had a disparate impact on older workers. For example, Respondent's defense centered around its policy/practice with regard to the recall and retention of salaried employees. Respondent's witnesses testified that its employment decisions were made in compliance with this policy, which provides that salaried positions will be filled - through hiring, recall or realignment - by the employee with the most salaried seniority who is capable of performing the work.

Complainant's evidence centered around an attempt to demonstrate that this policy was pretextual and/or disparately applied with regard to age. Complainant neither alleged, nor made any attempt to prove, that the policy itself had a disparate impact on older persons. Thus, this case is properly analyzed under a disparate treatment theory.

6. The realignment of Austin McMillion to the surface foreman position vacated by Larry Puffenbarger in March, 1986, was the subject of a timely charge filed with the West Virginia Human Rights Commission in April, 1986. Without determining whether Complainant established a prima facie case with regard to this issue, it is clear from the weight of the evidence that Repondent successfully demonstrated a legitimate, nondiscriminatory and nonpretextual reason for the decision to realign Austin McMillion rather than recall a laid-off surface foreman. At the time of Puffenbarger's resignation, McMillion's loadout duties had been drastically reduced, and it was no longer economically feasible for the company to retain McMillion's position as a full time position. In electing to realign McMillion to the surface foreman position, the company followed its policy and practice of recalling or realigning the employee with the most salaried seniority who is capable of performing the work. McMillion had more salaried seniority than Fain, and he had approximately three years experience as a surface foreman and was therefore capable of performing the duties of a surface foreman. Thus, the realignment of Austin McMillion was legitimate and nondiscriminatory.

7. The recall of Larry Puffenbarger in August, 1983, was not the subject of a timely charge, as Virgil Fain's only charge of age discrimination was filed in 1986, more than two and one-half years after the alleged act of discrimination. The West Virginia Human Rights Act requires that a charge of discrimination be filed within 90 days of the alleged discriminatory act, and this statute of limitations is jurisdictional and nonwavieable. W.Va. Code § 5-11-10; West Virginia Human Rights Commission v. United Transportation Union, Local 655 ("WVHRC v. UTU"), 180 S.E.2d 655 (W.Va. 1981). Furthermore, a "continuing violation" theory is not available to the Complainant under these circumstances. Complainant became aware of Puffenbarger's recall shortly after it occurred but filed no charge for more than two and one-half years. Moreover, as noted above, there is no evidence that Respondent's recall policy disparately impacted older workers, nor was there any evidence that Respondent's neutral recall and retention policy perpetuated prior discriminatory practices. WVHRC v. UTU, supra. Finally, it is well settled in employment discrimination law that each individual failure to recall, like an individual layoff, is a separate actionable event. Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982), cert. denied, 103 S.Ct. 257 (1982). See also, Morris v. Frank Ix & Sons, Inc., 486 F.Supp. 728 (W.D.Va. 1980), cited with approval in Lawson, supra. Thus, any claims of age discrimination which Complainant may have regarding the recall of Larry Puffenbarger are long since time-barred.

In any event, it is clear that the recall of Larry Puffenbarger in 1983, like the realignment of Austin McMillion in 1986, was legitimate and nondiscriminatory. Puffenbarger had more salaried seniority than Fain, and he also had several years more experience as a surface foreman. Thus, he was clearly the most senior person capable of performing the work, and his recall was not discriminatory.

8. Like the recall of Puffenbarger, the recall of Joe Bill Buckberry in 1983 was not the subject of any charge filed within 90 days of its occurrence. Thus, it, too, is time-barred. Moreover, even if it had been the subject of a timely charge, the recall of Buckberry was clearly legitimate and nondiscriminatory, since there was no showing that Fain was capable of performing the environmental engineering duties for which Buckberry was recalled. Moreover, the transfer of Buckberry to the preparation plant was also nondiscriminatory, since there was no showing that Fain was qualified or capable to be a preparation plant foreman, while Buckberry had served in that capacity on a temporary basis during the superintendent's illness.

9. Similarly, the recalls of Joe Toler and Betty Crews to the warehouse are nonactionable because they did not occur within the 90-day statutory time limit and because they were, in any event, legitimate and nondiscriminatory. Both Toler and Crews had more salaried seniority than Fain. Furthermore, Toler was as old or older than Fain and therefore cannot be cited as an example of disparate treatment.

10. At the hearing, the Complainant also challenged the

hiring of four laid-off UMWA employees to salaried positions as mine clerks. Only one of these hirings, however, that of Roy Palmer, occurred during the 90-day statutory period. Thus, claims with regard to the hiring of Danny Bostic, Asel Williams, and Terry Sanford are barred by the statute of limitations. In any event, each of these hirings was legitimate and nondiscriminatory and does nothing to demonstrate that Respondent's recall and retention policy was in any way pretextual. In each case, the salaried mine clerk position was offered to a laid-off UMWA employee who made it clear that he would accept any job available and was not simply seeking a return to his former position. Complainant, on the other hand, consistently asked "When are we going back to work?" or words to that effect, suggesting to Leckie management that he was inquiring only about a return to his former position. At no time did he make it clear that he would accept any position, regardless of salary or status, as did those who were hired as mine clerks. On the contrary, the Complainant persistently testified that he would accept only management positions, and it was uncontroverted that the mine clerk position, like the equipment coordinator position, is not a management position. Moreover, the evidence was uncontradicted that it would be most unusual, if not unprecedented, for a laid-off foreman to accept recall or rehire as a mine clerk. Thus, even if the Complainant's testimony on this issue were credible, which it was not, the Respondent would still have had no reason to believe that the Complainant would be interested in such a position. The

hiring of the mine clerks was therefore not discriminatory, nor does it demonstrate in any way the pretextuality of Respondent's policy regarding the filling of salaried positions.

11. The offering of the maintenance coordinator position to Larry Owens was not shown to be discriminatory, because no evidence as to Owens' age was introduced at the hearing. Furthermore, since the position was never filled, it is not, in itself, actionable. Moreover, the offering of salaried positions to UMWA employees was not pleaded in the current charge and, in this case, took place more than 90 days before the filing of the charge and is therefore time-barred. Furthermore, the offer to Owens cannot be used as evidence of pretext, because it was made by Joe Turley, who had no reason to believe that the Complainant would be interested in such an offer, since the Complainant had never spoken to him following his layoff. Again, it was uncontroverted that this is not a management position, and the Complainant made it clear at the hearing that he was interested only in management positions. Finally, even if Turley had been aware that the Complainant was interested in such a position, he testified that he does not believe the Complainant possesses the skills required to be a maintenance coordinator, as did Owens, and the Complainant offered no testimony to the contrary.

12. Mason Hughart's discussion with Gary Daniels regarding the surface foreman position is, likewise, neither pleaded in the current charge nor actionable in itself, since the position was never actually given to Daniels. In any event, there was nothing discriminatory about the discussion, nor can it

be used to establish pretext, since it involved merely an inquiry as to Daniels' willingness to fill in as surface foreman on a temporary basis pending a final decision on a replacement for Larry Puffenbarger.

13. Lastly, the Complainant was unsuccessful in his attempt to establish a discriminatory motive through allegations of age-related statements or actions by the Respondent. The allegations were not credible. Moreover, even if credible, such allegations are unavailing because the Complainant's administrative charge did not include a claim of pattern and practice of discrimination; thus, only evidence relating to the Complainant's recall is relevant to this action. Finally, even if all of these allegations were true, which they are not, the inference of discrimination created thereby would be far outweighed by the overwhelming evidence that the failure to recall the Complainant was in all ways proper and nondiscriminatory.

14. Thus, it is apparent that the Complainant has not been the victim of age discrimination. He was laid off in 1982, along with all of the other surface foreman to be recalled, Larry Puffenbarger, was the most senior person who was capable of performing the work. When Puffenbarger resigned, Austin McMillion was realigned to fill the vacancy, since his own position was being eliminated due to reduced job duties, and since he was even more senior than Puffenbarger and certainly capable of performing the job. Simiarly, the warehouse positions were filled by employees with more seniority than the

Complainant. The mine clerk positions were given to laid off UMWA employees, rather than the Complainant, because they made it clear that they would take any work available, while the Respondent reasonably believed that the Complainant was interested only in a return to his former position. The offer of the maintenance coordinator position to Larry Owens was not discrimnatory because Joe Turley had no reason to believe that the Complainant would be interested in such a position and, in any event, does not feel that the Complainant has the necessary skills. Finally, there was no discrimination in asking Gary Daniels if he would be interested in filling in as a temporary surface foreman.

15. In addition to the foregoing, it was admitted by the Complainant and absolutely uncontroverted in the record that Dana Cox, not the Complainant, is next in line for a surface foreman position. Thus, the Complainant has not proved, nor can he prove, that he was the victim of age discrimination, because he cannot establish that, but for his age, he would have been recalled.

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission issue an Order awarding judgment to the Respondent.

DATED: February 13, 1987

ENTER:

Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Heidi A. Kossuth, Esq.
Assistant Attorney General
1204 Kanawha Blvd., E.
Charleston, WV 25301

and

Roger A. Wolfe, Esq.
L. Anthony George, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, WV 25322

by mailing the same by United States Mail on this 13th day of February, 1987.

Theodore R. Dues, Jr.
Hearing Examiner