STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELELPHONE 304-348-2616

Quewanncoii C. Stephens
Executive Director

March 28, 1990

Thomas Harvey
1300 Roseberry Circle
Apt. 715
Charleston, WV 25311

Spring Hill Apartments
1300 Roseberry Circle
Charleston, WV 25311

Michael J. Delguidice, Esq.
Suite 700, One Valley Square
P.O. Box 1746
Charleston, WV 25326

Mike Kelly
Deputy Attorney General
812 Quarrier St.
L & S Bldg. - 5th Floor
Charleston, WV 25301

Re: Harvey v. Spring Hill Apartments
ER-399-86

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 WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

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

THOMAS HARVEY,

Complainant,

v. DOCKET NO. ER-399-86

SPRING HILL APARTMENTS,

Respondent.

FINAL ORDER

This matter matured for public hearing on 24 November 1986. The hearing was held in the fourth floor conference room of the Daniel Boone Building, 405 Capitol Street, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Nathaniel Jackson, Hearing Commissioner. The complainant appeared in person and by his counsel, Heidi A. Kossuth. The respondent appeared by its representative, Nancy Wilkinson, and its counsel, Michael J. DelGiudice.

On 19 February 1987 the hearing examiner submitted his recommended findings of fact and conclusions of law to the Commission. On 10 January 1990 the Commission reviewed said recommendations. Upon mature consideration of the examiner's recommendations, and all proposed findings, conclusions and supporting arguments submitted by the parties, and upon an independent review of the entire record herein, the Commission does hereby enter its findings of fact and conclusions of law as set forth hereinbelow. To the extent that the findings,

conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that 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 we overturn certain findings of fact made by the hearing examiner we have done so because we have found those findings to be clearly wrong and not supported by substantial evidence on the whole record.[1]

ISSUE TO BE DECIDED

Whether the respondent violated W. Va. Code § 5-11-9(a)(1) by unlawfully discriminating against the complainant with respect to the tenure, terms, conditions or privileges of employment because of his race.

Complainant, who is black and was discharged by respondent, alleges that he was treated differently than white employees, who were disciplined less severely than the complainant though both, according to complainant, engaged in

---

[1]Since no present member of the Commission was in attendance at the hearing below, and former Commissioner Jackson did not participate in the Commission's deliberation of this matter on 10 January 1990, we review this record under the limitations set forth in W. Va. Code § 5-11-8(d)(3).

similar conduct. Respondent asserts that it treated complainant as it did two other probationary employees, both white, who were discharged during their probationary period.

FINDINGS OF FACT

On thorough examination of the record herein, the Commission finds the following facts to be true and supported by clear and convincing evidence on the whole record:

1. Complainant, Thomas Harvey, is a black male, who, at all times relevant to this action, was employed by respondent as a security guard.

2. Respondent, Spring Hill Apartments, is an employer as that term is defined by W. Va. Code § 5-11-3(d).

3. Complainant began work with respondent on or about 14 December 1985. Complainant was not then on respondent's payroll, but was paid out of a special account. Complainant also worked under this status on 25 December 1985 and 1 January 1986. He was paid $25.00 for each of these first three shifts that he worked prior to actually being placed on the payroll.

4. Complainant understood that he was to work one of two shifts, either five p.m. to one a.m. or six p.m. to two

a.m. Though the first shift was supposed to officially end at 1:30 a.m., it was undisputed that guards were permitted to skip their half-hour lunch break and then leave work thirty minutes early.

5. Complainant became officially employed by respondent on 8 January 1986.

6. Respondent had a 90 day probationary period for all new employees. The testimony was uncertain as to whether or not complainant was ever clearly informed that he was under a 90 day probationary period. All other employees were aware of the probationary period.

7. Complainant worked as a security guard on the five p.m. to 1:30 a.m. shift on 25 January 1986. He was scheduled to work with Ronald Gregory, who had been assigned to work the six p.m. to two a.m. shift. As noted previously, when working the first shift, employees were permitted to leave at, but not before, 1:00 a.m.

8. Both complainant and Mr. Gregory, who is also black, had been drinking prior to reporting to work on 25 January. Complainant was not intoxicated when he reported to work and did not drink on the job.

9. At approximately 9:15 p.m. Mr. Gregory left the guard shack where he and complainant were stationed. He did not return until approximately five minutes before midnight. When he returned, he was heavily intoxicated. Mr. Gregory was singing, talking in a loud voice and falling down. Complainant asked Mr. Gregory to leave the guard shack but Gregory refused.

10. The overwhelming weight of the testimony showed that complainant left the guard shack prior to one a.m., in violation of his duties. This was testified to by witnesses Harless, Mrs. Gregory (spouse of Ronald Gregory), Middleton, and Brown, all of whom testified that they observed the guard shack prior to one a.m. and saw Mr. Gregory there alone and did not see complainant.

11. Complainant testified that he remained at the guard shack until one a.m. along with a Mr. Meyers and Donald Smoot, and that afterwards they went to Mr. Smoot's apartment. Complainant did not call either Mr. Meyers or Mr. Smoot to the stand, nor did he explain his failure to call them.

12. An informal investigation was conducted by the respondent for the purpose of determining what actually occurred on the night of 25 January 1986. That investigation disclosed the following:

(a) The complainant was scheduled to work as a security guard from five o'clock p.m. until one-thirty a.m., although it was common practice for the security guards to skip lunch and conclude their shift at one a.m.

(b) Before one a.m. on the morning of 26 January 1986, the complainant was not at the guard post, but rather was in the apartment of Donald Smoot. The complainant left the guard post before one a.m. and left it in the hands of Ronald Gregory, who was inebriated.

(c) Complainant did not inform his supervisors that he was leaving early or that the guard post was being maintained by an inebriated security guard.

13. As a result of the findings of the investigation, the respondent terminated the complainant. Mr. Gregory was also terminated. Mr. Gregory attended an alcohol rehabilitation program and was later rehired by the respondent as a painter.

14. Disciplinary action was taken against complainant for leaving the security area prior to one a.m. and for leaving an inebriated individual in charge of the guard shack. Complainant does not deny that Gregory was still in the vicinity of the guard shack when he left, nor does he deny

that he did not call any of his superiors to report Gregory or to ask for assistance.

15. Over a two year period prior to the hearing, respondent terminated three employees during their ninety day probationary period: Matt Barbour, Mike Rogers, and Thomas Harvey. Of these three persons, two are white and one, complainant, is black.

16. Complainant produced no evidence supporting a conclusion that respondent accorded disparate treatment to complainant because of his race.

17. Complainant produced no evidence that respondent treated complainant any differently than white probationary employees, two of whom had been terminated, one for unsatisfactory job performance and the other for drinking and absenteeism.

REJECTED RECOMMENDED FINDINGS OF FACT

For the reasons stated below, the Commission specifically rejects the following key findings of fact recommended by the hearing examiner:

1. "Complainant stayed at the guard shack until 1:00 a.m., the end of his scheduled duty shift. Mr. Meyers and

Donald Smoot were also at the guard shack at 1:00 a.m. At 1:00 a.m. Complainant locked up, secured the gates, turned off the radio, light and heater in the guard shack, turned his guard report in and left." (Recommended Finding of Fact No. 31).

We reject this recommended finding of fact because it is not supported by substantial evidence of the whole record. The only evidence supporting this finding is the testimony of complainant himself. On the other hand, four witnesses testified that they observed the guard shack between 12:30 a.m. and 1:00 a.m. and did not see Mr. Harvey on duty. Moreover, complainant failed to call Meyers and Smoot to the stand, supposedly neutral witnesses who, according to complainant's testimony, would have verified that Mr. Harvey remained on duty until 1:00 a.m. when all three of them, together, retired to Smoot's apartment. The failure to call Meyers and Smoot, or to explain such failure, raises an inference that their testimony would not have substantiated complainant's contentions.[2] The overwhelming weight of the evidence, without even considering the testimony regarding

---

[2]"It is well settled that the unexplained failure of a party litigant to call a material witness to give evidence in his behalf supports an inference that such witness, if permitted to testify, would testify against the interests of the party failing to present this testimony." Blow v. Compagnie Maritime Belge, 390 F.2d 74, 79 (4th Cir. 1968). See also, McGlone v. Superior Trucking Co., Inc., 363 S.E.2d 736 (W. Va. 1987).

complainant's admission that he left work early, makes this recommended finding simply not plausible.

2. "Mr. Gregory was called into the office in December of 1985. Ms. Wilkinson and Sam Harless were present at this meeting. Mr. Gregory was reprimanded for thirty days (30). Mr. Gregory was informed that if he drank anything within those thirty days (30), that he would lose his job." (Recommended Finding of Fact No. 58) and "Mr. Harless was warned for drinking at work previous to Complainant's termination. Mr. Harless was not placed on a thirty day suspension period following his drinking incident. Mr. Harless was not immediately fired for drinking on the job." (Recommended Finding of Fact No. 75).

According to the hearing examiner, these findings of fact prove that respondent treated black and white employees differently and, thus, lend support to complainant's allegation of discrimination. The undisputed evidence, however, establishes that Gregory, who is black, and Harless, who is white, and both of whom were non-probationary employees, were both warned about drinking on the job. After a subsequent offense involving alcohol, Mr. Gregory was placed on probation. After a third, and extremely egregious offense (the incident of 25 January), Mr. Gregory was terminated. This action was taken against Mr. Gregory, but not against Mr. Harless, because, as complainant himself testified, "Mr.

Harless quit [drinking while on duty]; Ron [Gregory] didn't."[3]

DISCUSSION OF THE EVIDENCE AND APPLICABLE LAW

Contrary to the apparent belief of the hearing examiner below, an employer may lawfully use different, more strict criteria in assessing the performance of a probationary or short-term employee than in evaluating a longer-term worker. See e.g., Smith v. Monsanto, 770 F.2d 719 (8th Cir. 1985), cert. den. 106 S. Ct. 1273 (1986). Length of affiliation with an employer can be a distinguishing non-discriminatory factor in determining an employee's discipline, Meyer v. Ford Motor Co., 659 F.2d 91 (8th Cir. 1981), even if it results in

---

[3]In rejecting the hearing examiner's key findings of fact, we are not unmindful of the great deference due them, particularly when they are based on an assessment of credibility. Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985). However, a thorough review of the record convinces us that complainant's version of events is neither "coherent" nor "facially plausible," is "internally inconsistent," and, additionally, is counter to the overwhelming weight of the other evidence. Id. at 1513. While claiming to be the victim of discriminatory discipline, Mr. Harvey produced not a shred of evidence that he was treated differently than similarly situated white employees. As discussed infra, even a cursory review of his testimony reveals that the gravamen of his grievance is that he was treated "unfairly" because he was fired for a first offense, not because he was treated differently due to his race. Also, in crediting complainant's story the hearing examiner gave no explanation whatsoever as to why he found the evidence offered by every witness but complainant to be not credible. A blanket assessment of credibility, without any discussion of the underlying factors such as demeanor, cannot be found controlling in the face of prodigious evidence to the contrary. We find no substantial evidence to support the hearing examiner's finding that complainant was more credible than all other witnesses and such a finding is clearly wrong.

different treatment of persons who committed similar acts. Smith, supra. See also, Pride, Inc. v. State Human Rights Commission, 346 S.E.2d 356 (1986). In the absence of proof of race, sex, or other invidious discrimination, the West Virginia Human Rights Act is not violated when a probationary employee is discharged, but a longer-term worker is much less severely disciplined, though the latter may be guilty of an equal or relatively worse offense.

Applying the law to the facts of this case, it is obvious that respondent could lawfully discharge complainant, a probationary employee of less than three weeks' duration, for leaving the guard shack early, while merely warning Gregory and Harless, who had long completed their respective probationary periods, for the relatively worse offense of drinking on the job. The lack of racial animus in this distinction is further buttressed by the fact that Gregory and Harless were treated similarly (warned) when both engaged in similar offenses. It was only when Gregory continued to drink on the job that he was more severely disciplined.[4]

If it was complainant's intent to put on a case of disparate discipline, it was incumbent upon him to compare the

---

[4]Though complainant testified that Harless brought alcohol to the guard shack on the evening of 25 January, an act for which he should have been disciplined, the testimony did not show that this allegation, which Harless denied, was ever brought to respondent's attention by Mr. Harvey prior to the hearing or that respondent had otherwise acquired knowledge of it.

treatment accorded him to that accorded similarly situated white workers, i.e., white workers who, like complainant, were still on probationary status. Complainant, however, failed to produce any evidence whatsoever that he was treated differently from white probationary employees. The only relevant evidence on this point was offered by respondent and established that two other probationary employees, both white, had been discharged. Complainant could not point to a single white probationary employee who had committed an offense similar to his yet was not terminated.

Finally, a careful reading of complainant's testimony makes it obvious that Mr. Harvey's complaint is not that he was discriminated against because of his race, but that it was unfair for respondent to discharge him for a first offense. Thus, Mr. Harvey states that he believes that he was "discriminated against" because he "didn't do no more than anybody else did" (all of whom had completed their probation) and that "if it had been Ron [Gregory] and Bob [Hill, a permanent black security guard, now head of security] out there, I don't believe Bob would have got fired" and that he at least was entitled to a "warning or tell me that I'm doing wrong" before he was fired.

While the Commission may agree that respondent's management personnel are not gifted in employee relations skills, we have no jurisdiction to reverse a decision which

may be unfair, but which is not generated by a discriminatory motive and is not in violation of our Human Rights Act.

CONCLUSIONS OF LAW

1. The complainant is a citizen of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

2. Respondent is an employer within the meaning of W. Va. Code § 5-11-3(d).

3. The West Virginia Human Rights Act is violated when an employer disciplines a non-member of a protected group less severely than a protected member though both engaged in similar conduct.

4. The complainant failed to produce any evidence whatsoever showing that he was disciplined more severely than similarly situated white employees.

5. The discharge of complainant was for a legitimate, non-discriminatory reason and properly took into account his probationary status.

6. The respondent did not violate the West Virginia Human Rights Act when it discharged complainant for leaving

his post early and under the control of a fellow employee who was severely intoxicated.

RELIEF AND ORDER

The Commission having found that respondent has not engaged in any unlawful discriminatory practice, it is the decision of the Commission that the complaint filed against it should be, and it hereby is, dismissed with prejudice.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 12th day of March, 1990, in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY