STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

June 4, 1986

Gail Ferguson
Assistant Attorney General
1204 Kanawha Boulevard, E.
Charleston, WV 25301

Doren Burrell
Assistant Attorney General
State Capitol Bldg.
Room 26-E
Charleston, WV 25303

RE: Shepherd Lockett V WV Department of Natural Resources
ER-425-85

Dear Ms. Ferguson and Mr. Burrell:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Shepherd Lockett V WV Department of Natural Resources/ER-425-85.

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

SHEPHERD LOCKETT,

Complainant,

vs. Docket No. ER-425-85

WEST VIRGINIA DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

O R D E R

On the 6th day of May, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Theodore R. Dues, Jr. along with the exceptions thereto filed by the respondent. After consideration of the aforementioned, the Commission does hereby not adopt the Findings of Fact and Conclusions of Law as its own, for the reasons set forth below.

The Commission finds substantial merit in respondent's exceptions to the Examiner's Recommended Findings of Fact and Conclusions of Law, exception no. 9, stating in sum that the decision of the Hearing Examiner was not properly grounded under the holding of the West Virginia Supreme Court of Appeals in Citizens Bank of Weirton v. West Virginia Board of Banking, 160 W.Va. 2201 233 S.E.2d 719 (1977), because the Examiner made no specific findings as to the credibility of the witnesses. In fact the only reference to credibility is a brief mention in the discussion section of the Recommended Findings. While it may be assumed that the Examiner found the complainant's evidence more

credible, there are considerable conflicts in the documentary and testamentary evidence which the Commission believes require more specific findings as to the credibility of the evidence and the reasons for such credibility decisions in order to satisfy the requirements of Citizens Bank and fundamental fairness.

The Commission further finds substantial merit to respondent's exceptions to rulings and procedure of the Examiner, exception no. 1, which is supported by the attached affidavit of Floyd Fullen. While the Commission stresses that it has no reason to believe that the Hearing Examiner was in any way influenced by the apparent conflict of interest cited in said exception, it is of the opinion that there is a sufficient appearance of impropriety as to taint the Examiner's decision. The mere appearance of impropriety must be avoided if the decisions of the Commission in matters affecting the civil rights of West Virginians are to maintain credibility and obtain respect.

For these reasons the Commission hereby ORDERS that this case be remanded for assignment to another Hearing Examiner for the purpose of holding a de novo hearing on its merits and for other proceedings not inconsistent herewith.

By this 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 ORDER AND THAT

THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 23 day of May, 1986.

Respectfully Submitted,

Betty Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHEPHERD LOCKETT,

Complainant,

v. Docket No. ER 425-85

WEST VIRGINIA DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

RESPONDENT'S EXCEPTIONS TO THE EXAMINER'S
RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The respondent's counsel received the Examiner's Recommended Findings of Fact and Conclusions of Law on February 21, 1986. The Findings of Fact contain many statements that are not supported by evidence in the record or are plainly contrary to the reliable, probative, and substantial evidence on the whole record. The decision also contains several conclusions that are contrary to the laws of the State of West Virginia. The decision reflects partiality by the hearing examiner, and is arbitrary and capricious. Therefore, the respondent respectfully requests that the West Virginia Human Rights Commission give full and fair consideration to the following exceptions:

1. The complainant did not satisfactorily perform the reasonable and legitimate duties of his job.

The respondent excepts to Finding of Fact No. 20. This statement is contrary to the evidence and is primarily a conclusory opinion, not a finding of fact. There is no

evidence in the record that the complainant performed any portion of his work well. The complainant was repeatedly advised that his accuracy and attention to detail needed to be improved. (Complainant's Exhibits Nos. 7, 10, 12, 14, and 17) Co-workers testified that the complainant's performance was "poor" (Transcript, Vol. II, page 252, hereinafter cited as Tr. II-___), required continued supervision (Tr. II-253), and was characterized by repeated errors (Tr. II-26), many of which were substantial (Tr. II-60). All employees had to share in the oversight of complainant's work because his work required continual review and correction (Tr. II-260).

2. The complainant did not incur a loss in wages because his job performance did not justify a merit increase.

The respondent excepts to Finding of Fact No. 30 because it misstates the facts and implies a duty to give complainant a merit increase regardless of his job performance. As stated above, the record contains considerable testimony concerning the complainant's mediocre performance of the duties assigned to him. Complainant himself admits that he had problems at that time adapting to the new responsibilities of a different type of job than his previous employment. (Tr. II-182) Under these circumstances, complainant did not perform his duties with a quality sufficient to justify a merit increase.

3. The hearing examiner ignored and omitted reference to the additional training courses attended by complainant's co-worker, Philip Brannon.

The respondent admits that Findings of Fact Nos. 13, 14, and 15 are correct, but respondent excepts to the failure to recognize similar and more extensive training undertaken by Philip Brannon. Mr. Brannon attended and successfully completed a number of special training courses sponsored by the International Right-of-Way Association and the American Institute of Real Estate Appraisers. (Respondent's Exhibits Nos. 1, 2, 3, and 6) One of these courses, in particular Course 101, is intensive and is well respected by the employer. (Tr. I-199) Mr. Lockett did not take all segments of these courses. (Tr. II-211, II-212) Mr. Lockett also failed to inform his employer of his satisfactory completion of some of the courses which he did attend. (Tr. II-212, II-213) Furthermore, complainant has not attended any additional training courses since 1981. (Tr. II-213) The examiner also failed to note that the complainant dropped out of the International Right-of-Way Association after his first six months on the job. (Tr. II-185)

4. Complainant received an increase in pay when he was promoted to the Technical Assistant I position.

The respondent excepts to Finding of Fact No. 23 as being contrary to the evidence. Employment records introduced by the complainant show that he received an increase from $5.03/hour to $5.50/hour when he was promoted to the Technical Assistant I position. (Complainant's Exhibit 21A)

5. Complainant was advised that filing and clerical tasks were regular duties of persons in the Technical Assistant classification.

The respondent excepts to the last sentence of Finding of Fact No. 24. This statement contradicts the complainant's own testimony. Complainant testified that filing and

shipping were included in an explanation of his job duties as Technical Assistant I. (Tr. II-202) Additional testimony by complainant's supervisor indicates that all employees of the office were responsible for maintaining office files. (Tr. II-233)

The respondent also excepts to the second sentence of Finding of Fact No. 24. Respondent does not deny that the complainant once sought other employment, but there is no reliable, credible evidence that it was a result of racial degradation or humiliation.

6. Complainant failed to show any disparate treatment between him and white co-workers with regard to office cleaning chores.

The respondent excepts to Finding of Fact No. 27 because it is not supported by any evidence. Respondent admits that "housecleaning" chores were occasionally necessary and that complainant was once asked to clean out a small refrigerator and to run a vacuum cleaner when the location of the office was changed. Complainant did not offer any evidence to show that co-workers did not have to do similar chores. The complainant has the burden of proving disparate treatment, and yet he failed even to allege that he was singled out for such tasks. Principles of law and fairness dictate that complainant's failure to meet his burden of proof on this issue be plainly stated in the administrative decision or, in the alternative, that Findings of Fact Nos. 25 and 26 be omitted from the Commission's final decision.

7. The complainant received routine instruction and explanation concerning the type of work he was expected to complete.

The respondent excepts to Finding of Fact No. 16 as being contrary to the evidence and an exaggeration of the complainant's allegations. Both administrators in the Office of Land and Real Estate testified to the training and explanations given to the complainant. (Tr. I-87 and II-25). Much of this training was done with the use of examples. (Tr. I-190) Complainant himself indicated that he had been given an explanation that his job included several duties:

"Q. [Complainant's counsel] Was that part of your duties to file?

"A. [Complainant] Yes.

"Q. That was part of your duties?

"A. Yes, filing, shipping.

"Q. But was it part of what was explained to you to be part of your duties as a technical assistant?

"A. That was one of them." (Tr. II-202)

In assessing the "adequacy" of the explanation of job responsibilities, the hearing examiner went beyond the record and even beyond the allegations of the complainant. The examiner could not rationally find that "there was absolutely no advice * * * pertaining to the proper priority the complainant was to give to his work assignments" when neither party presented evidence as to the existence or non-existence of such advice. Nowhere in the pleadings or the presentation of the case did the complainant allege that he had not been given this type of advice. The examiner's

finding is not supported by anything in the record and is outside or the issues raised by the complainant.

8. The respondent excepts to Finding of Fact No. 17 because it is unreasonably vague and not supported by the evidence.

The hearing examiner failed to identify the nature or the source of the alleged "flagrant racial statements and stereotypes." The record is, in fact, devoid of any racial statements. Without specific reference to the type of statement or stereotype, the finding is inadequate. The finding also fails to identify the source of the alleged incidents. Who was responsible: a supervisor? the employer? a co-worker?, or outside parties doing business in the office? The sweeping nature of the examiner's statement prevents the respondent from effectively challenging or refuting such a finding. It also prevents any appellate or reviewing authority from judging the propriety or basis of the finding.

9. The hearing examiner failed to state his evaluation of the credibility of the witnesses or the basis for such evaluation.

In an administrative decision, the agency must set forth the underlying evidentiary facts which led the agency to its conclusion along with an explanation of the methodology by which any complex evidence was evaluated. Citizens Bank of Weirton v. West Virginia Board of Banking & Financial Institutions, 160 W. Va. 220, 233 S.E.2d 719, 727 (1977). Explanation of the methodology should include such things as the credibility of witnesses, validity of tests and statistical data, and the accuracy of expert predictions. 233 S.E.2d at 726. The findings of fact should include

determinations of which witnesses were believable and the reasons why they were. Failure to do so means the decision is arbitrary and capricious per se. The fact finder in an administrative proceeding cannot simply find for one party over another without stating the basis for his determinations. Clearly the fact finder has the perogative to evaluate the credibility of witnesses, but that person should set out the evaluation in the decision.

Such a requirement also promotes proper and effective scrutiny by any judicial body reviewing the decision. If the conclusions of the hearing examiner are to withstand review of their rationality, the examiner must explain whom he believed and whom he did not.

EXCEPTIONS TO RULINGS AND PROCEDURE OF THE EXAMINER

1. The recommended decision is void and irrevocably tainted by the examiner's failure to file the decision in a timely manner.

After the hearing of this case was conducted, the hearing examiner, Theodore R. Dues, Jr., accepted employment as defense counsel in a different case before the Human Rights Commission. In that case Doren Burrell, counsel for the respondent herein, was already assigned as complainant's counsel of record. As explained in the attached affidavit, Mr. Burrell objected to Mr. Dues' appearing in opposition to him while the decision of the Lockett case (the instant case) was still pending. In order to avoid any appearance of impropriety or the potential to hold one decision "hostage" during the pendency of another proceeding, the second hearing examiner instructed Mr. Dues to complete and file

his decision in the Lockett case prior to the hearing date of the other proceeding. (See attached affidavit)

Mr. Dues did not comply with this instruction. A hearing was held in the other case on October 24, 1985. On December 28, 1985, the hearing examiner, Floyd Fullen, submitted a recommended decision in the case. In that decision, the hearing examiner found for the complainant's and assessed monetary damages against Mr. Dues' clients. Approximately seven (7) weeks later, Mr. Dues filed his recommended decision in the instant case, assessing unprecedented damages against Mr. Burrell's client.

Not only did it create an appearance of impropriety, this delayed filing violated clear mandates on the time for submission of the decision. Rule 7.22(c) of the Rules of the West Virginia Human Rights Commission requires submission of the decision within sixty (60) days after the conclusion of the hearing. The last day of hearing in this matter was September 24, 1985, but the decision was not filed until February 19, 1986, or 148 days later. Submission of the decision on that date is also a violation of the order issued by the West Virginia Supreme Court of Appeals in the case of Allen v. State of West Virginia Human Rights Commission, ___ W. Va. ___, 324 S.E.2d 99 (1984). The untimeliness of the decision and the circumstances preceding its submission irrevocably taint the decision with the appearance of impropriety and it must be stricken as void.

2. The hearing examiner erred in not admitting examples of complainant's work product.

During the first day of hearing in this case, respondent's counsel disclosed that numerous documentary examples of complainant's work were available. (Tr. I-177C) Counsel was informed of the existence of these documents only two

(2) working days prior to the hearing. Because of the volume of documents and the late discovery of their existence, counsel could not evaluate their potential for use as exhibits.

The disclosure was prompted by questions from complainant's counsel asking for documentation of complainant's inadequacies. (Tr. I-98) The hearing examiner then scheduled time, prior to continuation of the hearing the following day, for complainant's counsel to review the documents. (Tr. I-180) After this was done, the hearing examiner excluded the documents as evidence because their use might require "an extraordinary delay in the proceedings to either call rebuttal in or supplemental witness" (Tr. II-9), and for failure to supplement a discovery request when the existence of the documents became known.

The examiner should have allowed use of the documents. In the case of Prager v. Meckling, ___ W. Va. ___, 310 S.E.2d 852 (1983), a document was offered at trial, the existence of which had been denied by the defendant in a pretrial deposition. The document was discovered a week before trial, but its existence was not disclosed to the opposing party. The West Virginia Supreme Court of Appeals held that it was not an abuse of discretion to admit the document. The defendant had testified in his deposition as to the matters to which the document related. At trial, other witnesses testified to these same matters and the document was merely corroborative of such testimony. Surprise and prejudice were, therefore, minimized. 310 S.E.2d at 857.

In this case, the respondent plainly stated in prehearing interrogatory answers that complainant had not been promoted because of poor job performance. Additional

documents provided during discovery indicated that complainant's accuracy and attention to detail were specific areas of poor performance. The complainant could not claim surprise as to these assertions. Several witnesses testified to specific problems and errors during the hearing. The excluded documents would, therefore, corroborate such testimony. Any potential prejudice was further minimized by the procedure giving complainant an opportunity to examine the documents. Lastly, there was no showing that the failure to supplement discovery was the result of willful or bad faith action which would necessitate the sanction of exclusion.

Excluding the documents because they may have delayed the proceedings was prejudicial to the respondent. The information contained on those documents was material to respondent's asserted defense. In view of the fact that the hearing was later continued for one (1) week, the potential delay from use of the documents would not have prejudiced either party.

Admission of the documents would have substantiated or refuted respondent's claim beyond dispute. Exclusion of them prevented the Human Rights Commission from ascertaining the truth.

EXCEPTIONS OF EXAMINER'S
RECOMMENDED CONCLUSIONS OF LAW

1. The Human Rights Commission has no jurisdiction over the respondent.

The respondent excepts to Conclusion of Law No. 1 as to the Commission's jurisdiction over the parties in this case. The respondent, West Virginia Department of Natural Resources, is an administrative department of the State of West Virginia.

Article VI, Section 35 of the Constitution of West Virginia provides:

> "The State of West Virginia shall never be made defendant in any court of law or equity, except the State * * * may be made defendant in any garnishment or attachment proceeding * * *."

This case is neither an attachment nor a garnishment proceeding and, therefore, this action may not proceed against the respondent. This prohibition may not be waived.

2. The West Virginia Human Rights Commission does not have jurisdiction over a substantial portion of the subject matter of this case.

The respondent excepts to Conclusion of Law No. 2 as to the Commission's jurisdiction over the subject matter of the case. Section 10 of the West Virginia Human Rights Act (W. Va. Code § 5-11-1 et seq.) provides, in part: "Any complaint filed pursuant to this article must be filed within ninety days after the alleged act of discrimination." Code 5-11-10. The complainant initiating this action was filed on January 24, 1985. The Human Rights Commission, therefore, has no jurisdiction to decide claims of alleged discriminatory action prior to October 22, 1984.

Over respondent's objection, the complainant testified that he was unfairly denied advancements in salary at different times in the years 1980-1984. Each denial is a discrete incident fixed in time. They occurrecd prior to October, 1984, and are beyond the jurisdiction of the Human Rights Commission to consider.

In addition to the clear lack of jurisdiction, complainant waived any claim concerning such actions by failing to file his complaint within the appropriate time period. By resting on his rights, complainant breached his duty to mitigate damages.

In spite of this situation, the examiner took evidence on these matters and awarded compensatory damages for actions occurring as far back as 1980.

3. Complainant failed to establish a prima facie case of discrimination.

Respondent excepts to Conclusion of Law No. 3 because it is not supported by the facts. As discussed above in the Exceptions to the Findings of Fact, the probative evidence in the record does not support the findings that the complainant performed his work satisfactorily or that he was subjected to "continual disparate treatment." Furthermore, there is no evidence in the record to show that the respondent was responsible for the alleged discrimination.

There is nothing in the record or the Findings of Fact by which the alleged treatment can be attributed to the respondent. There is no identification of the persons responsible. The record also shows that there is no way the respondent knew or should have known of the events in question. (See e.g., Tr. II-119, 120) Absent some showing that the respondent was responsible, there can be no prima facie case against the respondent.

4. Complainant was not given frequent pay raises because he failed to perform his work with sufficient quality or efficiency.

Respondent excepts to Conclusion of Law No. 4 as being arbitrary, capricious, and clearly wrong. This conclusion indicates total disregard of substantial, credible evidence in the record and is based, in part, on the erroneous ruling regarding admission of the examples of complainant's work.

5. The Human Rights Commission may not assess monetary damages in excess of its jurisdiction.

The respondent excepts to Conclusions of Law Nos. 5 and 6 as being in excess of the legitimate authority of the Commission. The Commission may not assess monetary damages against the respondent because it lacks personal jurisdiction over the state as a defendant. Although actions may be brought against state agencies when recovery is sought from and up to the limits of the agency's insurance policy benefits, Pittsburgh Elevator Company v. West Virginia Board of Regents, ___ W. Va. ___, 310 S.E.2d 675 (1983), no such policy is in effect here. The insurance maintained on behalf of the Department of Natural Resources does not cover liability of this nature. Therefore damages, and particularly damages from emotional distress, cannot be assessed against the respondent.

Also, damages may not be assessed in this case for any incidents occurring more than ninety (90) days prior to January 24, 1984. Such events are beyond the statutory limit on the jurisdiction of the Commission. As the backpay award (and presumably the emotional distress damages) are based upon events as far back as 1980, these assessments exceed the authority of the Commission.

The award of damages for mental pain and anguish is also prohibited by Article X, Section 3, of the Constitution of West Virginia. This section prohibits expenditure of

public funds for any purpose other than that for which the money is appropriated. There being no appropriation by the Legislature for the payment of incidental damages, the award is barred as contrary to law.

6. The award of $100,000.00 in damages for mental pain and anguish is excessive and unwarranted.

The award of $100,000.00 in emotional distress damages, if approved, would be the largest single award ever granted by the Commission. It is unprecedented and far exceeds the average figure for such awards. The extreme award in this case bears no reasonable relation to the other compensatory damages which amount to approximately $2,400.00.

Such an award is monstrous, outrageous, unreasonable, and shocking to the conscience. The size of the award, along with the examiner's unreserved adoption of all facts favorable to the complainant, manifestly demonstrates the partiality of the hearing examiner. As such, the award should be overturned or reduced. See, Jordan v. Bero, 158 W. Va. 28, 210 S.E.2d 618, 638 (1974).

Assuming for the sake of argument that all of complainant's assertions were true, the behavior so characterized would pale beside many more egregious situations of outright malice presented to the Commission. Despite this fact, the recommended award is monstrously greater than any other in the history of the Commission. In light of the fact that many of the examiner's findings are not supported by or are an exaggeration of facts in the record, the award is wholly disproportionate to the evidence.

Such an award, unsupported by a preponderance of reliable evidence, is purely arbitrary and capricious. It is without any reasonable basis and should not stand.

CONCLUSION

Due to the examiner's failure to admit probative evidence, the taint of impropriety in the untimely submission of the decision and the excessiveness of the awards, a new hearing would normally be required. However, because the respondent is not subject to the jurisdiction of the Commission, this case should be dismissed.

WEST VIRGINIA DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

By Counsel

CHARLES G. BROWN
ATTORNEY GENERAL

DOREN BURRELL
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305

Counsel for Respondent

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to wit,

Floyd Fullen, duly sworn on his oath, deposes and says that:

1. He is an attorney, licensed to practice law in the State of West Virginia;

2. In the latter half of the year 1985, he was engaged by the West Virginia Human Rights Commission to work as a Hearing Examiner, presiding over administrative hearings conducted pursuant to the West Virginia Human Rights Act;

3. Among the cases assigned to him was Herman L. Partridge and Ohio Masonry, Inc. v. Ottmer Lakes Estates, Inc.; Marsha Cottle - Manager; and McCue Realty, Inc., Docket Number HR-246-82;

4. On the third day of October, 1985, he held a telephone conference with counsels for the parties in the Partridge case to ascertain the status of the case and establish a hearing schedule;

5. Participating in the conference were Doren Burrell, Assistant Attorney General, counsel for the claimants, and Theodore R. Dues, Jr., newly retained counsel for the respondents;

6. During the conference on October 3, 1985, Mr. Burrell explained that he recently had appeared in a sepa-

rate case before the Human Rights Commission in which Mr. Dues was the Hearing Examiner and Mr. Burrell expressed several concerns about the propriety of Mr. Dues opposing him while the other case was still pending;

7. After discussion with both counsel, the affiant determined that there was a potential problem of impropriety and requested that Mr. Dues submit his recommended decision in the previous case to the Human Rights Commission before the Partridge hearing began;

8. Mr. Dues stated that his decision would be ready at that time;

9. Affiant conducted the hearing on the Partridge v. Ottmer Lakes Estates, Inc. case on the 24th day of October, 1985;

10. On the 28th day of December, 1985, affiant submitted a Recommended Decision to the West Virginia Human Rights Commission, copies of which were served, by first class mail, upon Mr. Dues and Mr. Burrell, at their respective offices; and

11. In said decision, affiant found for the complaints and assessed monetary damages against Mr. Dues' clients, the respondents.

Further the affiant saith not.

Floyd Fullen

FLOYD FULLEN, AFFIANT

CERTIFICATE OF SERVICE

I, Doren Burrell, Assistant Attorney General and counsel for respondent, do hereby certify that a true copy of the foregoing Exceptions to the Examiner's Recommended Findings of Fact and Conclusions of Law was served upon counsel for petitioner by hand delivering said copy to counsel's office on this the 31ST day of March, 1986, at the following address:

TO: Gail M. Ferguson, Esquire
Assistant Attorney General
Office of the Attorney General
1204 Kanawha Boulevard, East
Charleston, West Virginia 25301

Doren Burrell
DOREN BURRELL

Taken, subscribed, and sworn to before me this 7th day of March, 1986.

My commission expires: 12-12-95

Notary Public

WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHEPHERD LOCKETT,

Complainant,

vs. Docket No. ER 425-85

WEST VIRGINIA DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on September 16, 17 and 24, 1985. The hearing was held at Room E-26 of the office of the State Attorney General's office. Appearing at the hearing were the Complainant, in person, and by his counsel, Gail Ferguson. The Respondent appeared by its counsel, Doren Burrell. Also present on behalf of the Respondent was James Jones. The presence of a Hearing Commission was previously waived by the parties.

After considering the testimony of record and the documentary evidence the Examiner makes the following recommended decision.

ISSUES

1. Whether the Complainant was paid less than a white co-employee for similar work performed over a given period of time during his employment with the Respondent.

2. Whether such disparaty in pay was effected in part as a result of the Complainant's race.

FINDINGS OF FACT

1. The parties stipulated to the following:

A. The Complainant's race is black.

B. The race of the target co-employee, Phillip Brannon, is white.

C. Both the Complainant and Brannon are employed with the Respondent's office of Land and Real Estate.

D. Complainant's co-employees Jones, Reppy and Dean are caucasian.

E. Dean was employed with the Respondent until July 11, 1985.

2. The Complainant's educational background consists of a B.S. degree in business administration and nine college credits in taxation and three credits in social work.

3. His experience includes eight years of social work and four years as an administrative assistant. In addition, he has served as a field manager assistant for the City of New York.

4. As a field manager assistant the Complainant was responsible for making audits and reports, as well as, preparing corrective action plans.

5. The Complainants' experience as administrator consisted of his daily supervision of a housing unit. He was instrumental in developing the procedure utilized in this function and the implementation of the same.

6. The Complainant performed this position satisfactorily and terminated his employment with the City of New York for personal reasons.

7. On or about January 29, 1980 the Complainant was hired as a trainee with the Respondent.

8. At the time of his interview for this position, the Complainant was advised that he would receive a pay raise at the end of his six-month probationary period and for each succeeding six months provided there was no freeze in effect.

9. In addition, the Complainant was advised at his interview of the promotional opportunities available to him within the department.

10. The Complainant was supervised concurrently by Reppy and Brannon, an appraiser I and trainee, respectively.

11. An appraiser I position was higher in the organizational chart than the trainee position. However, the position held by Brannon, at this time, was on the same level of that held by the Complainant.

12. The Complainant's supervisor, Mr. Jones, advised the Complainant that Brannon and the Complainant would be divided in their responsibilities to the department; with the Complainant being assigned to do work for the division of parks and forestry and Brannon to perform work for the wildlife division.

13. During his first six months of employment the Complainant attended various seminars and courses offered by the Department of Highways as well as outside organizations.

14. The Complainant completed these courses and seminars successfully.

15. In addition, the Complainant became a member of the Right-Of-Way Association.

16. The Complainant did not receive an adequate overall explanation of his position and job responsibilities; specifically there was absolutely no advice from his superiors pertaining to the proper priority the Complainant was to give to his work assignments in organizing his daily activities.

17. On several occasions the Complainant was subjected to flagrant racial statements and stereotypes.

18. Jones treated the Complainant adversely after seeing the Complainant conversing with a white female employed within the division.

19. The Complainant was the only employee being supervised by a peer as well as by those other employees holding a higher position within the division.

20. The Complainant performed his work satisfactorily and any legitimate complaint concerning the Complainant's work product were directly a result of the inconsistent and unreasonable expectations in demands placed upon him by those persons designated to supervise his daily activities.

21. The Respondent failed to increase the Complainant's wages after his probationary period although Brannon, a white co-employee, was provided a raise every six months for the 1980 work year.

22. At the conclusion of the Complainant's first year of employment he was promoted to the rank of Tech Assistant I.

23. At the time of his promotion to tech assistant I, the Complainant received no salary increase. Additionally, no explanantion was provided to the Complainant for why a pay

increase was not provided.

24. The Complainant's work load and responsibilities continued to diversify during his tenure of employment. That at one point the work enviroment at the Respondent's place of business became so racially degrading and humiliating that the Complainant actively sought employment elsewhere. The Complainant was required to deliver, xerox, retrieve and replace files and perform other clerical oriented duties for Reppy, Brannon and Jones. These functions are functions which fell outside of the Complainant's job responsibilities in the Respondent's organizational scheme and was not reciprocated in kind by Reppy, Brannon or Jones.

25. The Complainant was directed by Jones to clean a refrigerator on the job premises and was required on an occasion to run a vaccum cleaner.

26. While performing these menial tasks the Complainant was still responsible for his normal work responsibilities.

27. White peers were not required to perform "house cleaning" duties as a required function of their position. Brannon had on several occasions been counseled or advised in meetings that his work performance was not adequate.

28. Brannon received raises during these periods of time not withstanding the negative reflections of his work performance by his superior.

29. The only other employee on the Respondent's staff employed in the Complainant's department who had more than one supervisor was the secretary; she had two supervisors Reppy and

nondiscriminatory reason for the Complainant's pay disparity.

Texas Department of Community Affairs vs. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981).

5. The Complainant is entitled to backpay with prejudgment interest in the amount equivalent to the percentage of pay increase provided to Brannon for the work year 1980.

6. The Complainant is entitled to incidental damages for mental pain and anguish in the amount of $100,000.00.

DISCUSSION

The Complainant was hired by the Respondent to perform certain duties in the division of parks and forestry. Although he performed those functions satisfactorily he found himself in a no win situation. Specificially, he was required to report to two persons other than his direct supervisor. Each of these people, for reasons understandable only to them, gave the Complainant subjective and unjustified poor reviews on his work product. They subjected him to performing menial and "step-and-fetch it" tasks on a daily basis. At one time the Respondent's conduct became so outragious that Jones, Complainant's direct supervisor, ordered the Complainant to clean a refrigerator and on at least one occasion to run a vaccum cleaner.

For these and other reasons the disparity in pay and the evaluations of the Complainant's work product are clearly a product of basic racism. The credible evidence indicates that the Complainant received his last objective review by the Respondent on the day of his interview in December 1979. Racist actions such as these cannot be condoned nor accepted.

Jones.

30. The Complainant incurred a loss in wages due to the failure of the Respondent to provide him a merit increase during the year of 1980.

31. The Respondent's conduct in its daily interaction with the Complainant caused the Complainant extreme humiliation and embarrassement.

CONCLUSIONS OF LAW

1. The West Viriginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. As in all cases, the Complainant bears the burden of proving the allegation of his complaint that the Respondent discriminated against him in the conditions of his employment by dening him a comparable salary to that of his white peers.

3. The Complainant established a prima facie case by introducing evidence which established that:

A. That he is a member of a protected class;

B. That he has performed his work satisfactorily;

C. That he has been denied pay considerations on equal basis to that of similarily situated whites; and

D. That he has been subjected to continual disparate treatment in the Respondent's work enviroment and condition considerations based upon his race.

Shepherdstown Volunteer Fire Department vs. State ex rel. State Human Rights Commission, 209 S.E.2d 342 (W.Va. 1983).

4. The Respondent failed to articulate a credible

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:

Gail Ferguson, Assistant Attorney General, 1204 Kanawha Blvd., East, Charleston, WV, 25301

Doren Burrell, Assistant Attorney General, State Capitol Bldg., Room 26-E, Charleston, WV 25305

by mailing the same by United States Mail on this 20th day of February, 1986.

Theodore R. Dues, Jr.
Hearing Examiner

The Examiner feels that the damage award in this case is significant but the same is clearly warranted in light of the frequency of the racist actions, the seriousness of the racist actions and the overall impact upon the Complainant as a result of the same.

PROPOSED ORDER

Accordingly the Examiner recommends to the Commission that it enter an Order providing the following relief:

A. That judgment be awarded to the Complainant;

B. That the Complainant be awarded compensatory damages for loss of pay in an amount equal to the percentage increase in pay provided to Complainant's co-employee Phillip Brannon;

C. That the Complainant be awarded incidental damages in the amount of $100,000.00 for mental pain and anguish; and

D. That the Commission enter a cease and desist Order in this matter.

DATED February 19, 1986

ENTER:

Theodore R. Dues, Jr.
Hearing Examiner