STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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GASTON CAPERTON
GOVERNOR

PHYLLIS H. CARTER
EXECUTIVE DIRECTOR

March 27, 1989

Geneva D. Mayle
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Charleston, WV 25301

Re: Mayle v. North Central WV Community Action Association, Inc.
REP-242-87

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 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 final order.

Sincerely,

Phyllis H. Carter

Phyllis H. Carter
Executive Director

PHC/mst
Attachments

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

NOTICE

OF STATUTORY RIGHT TO JUDICIAL REVIEW

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

GENEVA D. MAYLE,

Complainant,

vs. DOCKET NO.: REP-242-87

NORTH CENTRAL WEST VIRGINIA
COMMUNITY ACTION ASSOCIATION, INC.,

Respondent.

O R D E R

On the 12th day of January, 1989, the West Virginia Human Rights Commission reviewed the Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision of Hearing Examiner James Gerl and Complainant Geneva D. Mayle's Exception to the Hearing Examiner's Findings of Fact and Conclusions of Law in the instant case.

After consideration of the Hearing Examiner's recommendations and Complainant's exceptions, the Commission does hereby adopt in toto the Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision.

It is hereby ORDERED that the Hearing Examiner's Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision be attached hereto and made a part of this final order.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties shall have ten (10) days within to request reconsideration of the West Virginia Human Rights Commission's Order, and that they may seek judicial

review.

ENTERED this 3rd day of March, 1989.

George Rutherford

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

GENEVA D. MAYLE,

Complainant,

v.

DOCKET NUMBER: REP-242-87

NORTH CENTRAL WEST VIRGINIA
COMMUNITY ACTION ASSOCIATION, INC.

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on August 5, 1987 and June 10, 1988 in Fairmont, West Virginia. Commissioners Iris Bressler and Jack McComas served as Hearing Commissioners. The complaint was filed on November 24, 1986. The notice of hearing was issued on April 9, 1987. Respondent answered on March 4, 1987. A telephone Status Conference was convened on May 27, 1987. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that

they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent reduced the number of hours she worked in reprisal for her testifying on behalf of a co-worker who had filed a discrimination grievance. Respondent maintains that complainant's hours were reduced because of budgetary constraints imposed by respondent's Head Start funding source.

FINDINGS OF FACT

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

1. Complainant has been employed with respondent since September 2, 1972, and is presently employed by respondent as a Health Coordinator for Barbour County.

2. Cook, Area Supervisor of the Head Start Program for Barbour and Randolph counties, filed a complaint alleging race discrimination and harassment by respondent as carried out by the Program Director, Alvaro, Docket No. ER-312-86.

3. Alvaro is presently employed by respondent as Program

Director of the Head Start program and in this capacity has the responsibility of drafting the yearly budgets.

4. Complainant testified at Cook's internal grievance proceeding on June 19 and 20, 1986.

5. The internal grievance proceeding on June 19 and 20, 1986, involved the same issues as those alleged in Cook's complaint with the Human Rights Commission, Docket No. ER-312-86.

6. The Taylor County Health Coordinator's hours and pay were cut at the same time as complainant's.

7. The Taylor County Health Coordinator and the Barbour County Health Coordinator are each responsible for sixty (60) children enrolled in the Head Start program in their respective counties.

8. The Marion County Health Coordinator is responsible for one hundred (100) children enrolled in the Head Start program in Marion County.

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

9. On approximately August 27, 1986, complainant learned that her hours would be reduced from 40 hours per week to 30 hours per week and that her pay would be reduced by $280.00 per month for the nine month work year from September, 1986 to May 1987.

10. In August 1987, complainant's hours were increased to 32 hours per week for the nine month work year from September 1987 to May 1988.

11. Complainant continued to serve approximately the same number of families and children after the August 1986 reduction in her hours.

12. Respondent's budgetary process for the Head Start program requires that the annual budget prepared by Alvaro be approved by the Parent Policy Council, the Executive Director and respondent's Board of Directors before it is submitted to the Region III office of the Head Start Program in Philadelphia, Pennsylvania for final approval and award of the federal grant which funds the program.

13. The Parent Policy Council is composed of parents of children who are or were in the Head Start program and representatives of community and civic organizations in the counties served by respondent's Head Start program.

14. The purpose of the Parent Policy Council is to serve as a citizens advisory group for respondent's Head Start program. The Parent Policy Council has the authority to approve or disapprove the annual budget prepared by the Head Start Director.

15. The draft budget for Head Start program year 1986-87 was submitted by Alvaro at the end of November, 1985. Said draft budget provided no reduction in hours for either complainant or the Taylor County personnel.

16. In late January or early February, 1986, respondent received a memorandum from the Regional Program Director for Region III in Philadelphia which included a caveat that class sizes in excess of twenty children would not be funded.

17. Because of difficulties in negotiations with the Monongalia Board of Education Head Start Program officials, respondent revised its budget for 1986-87 by serving five fewer children and by reducing the Taylor County personnel. In April, 1986, respondent

was notified by Region III that its draft budget was rejected because five fewer children were being served.

18. Respondent requested that Region III representatives meet with officials of respondent and the Monongalia County Board of Education in conjunction with a regional Head Start seminar. Such meetings took place on June 4 and 5, 1986 in Philadelphia, Pennsylvania.

19. At said meetings a representative from Region III expressed the opinion that respondent's budget was out-of-line, that respondent was overstaffed, and that respondent could change its budget to accomodate the five additional Head Start children which Region III required without taking any portion of the funding awarded to the Monongalia County program. Vincinanza of Region III suggested at the June 4 meeting that respondent's Health or Social Service Staffing could be adjusted. Davis was present at part of the June 4 meeting.

20. At the meeting on June 5, 1986, requested by respondent for suggestions as to how its budget could be changed to satisfy the regional funding authority, Region III representatives pointed out a disparity in the various county Head Start programs as to the number of enrollees served; that is, in certain counties only 60 children were being served. Davis was not present on June 5, 1986.

21. As a result of the June 4 and 5, 1986 meetings respondent was required to revise its budget so as to serve the five additional children and the Monongalia County program was permitted to keep the entire expansion grant thus leaving respondent with the burden of

serving five additional Head Start children without the benefit of the grant money awarded to Monongalia County for that purpose.

22. On June 9, 1986, respondent held a meeting to discuss reductions in hours and in positions of respondent. Other alternatives were considered. It was the general concensus of those present at the June 9, 1986 meeting, including Cook, that the most likely area for reduction was the Health Component Staff.

23. On June 16, 1986, respondent held another meeting at which Alvaro presented a plan for a revised budget which reduced the vacant position of Health Care Director at agency headquarters from a twelve month position to a ten and one-half month position and from a 40 hour to a 30 hour per week position, the reduction of complainant and the Taylor County Health Coordinator from 40 hours to 30 hours per week, and the elimination of the purchase of a bus. No strong objections to the revised budget were raised at the June 9 or the June 16 meetings by Cook or any of the other staff present.

24. On June 18, 1986, the Parent Policy Council approved the amended budget proposed by Alvaro. The Board of Directors of respondent subsequently approved the budget.

25. Because respondent's fiscal year begins on July 1, Region III issued a notice to respondent conditionally awarding respondent's Head Start grant provided that respondent serve the five additional children and provided that respondent submit a revised budget by September 1, 1986. The revised budget was approved by Region III.

26. At Cook's grievance hearing on June 19 and 20, 1986, complainant, Henline and Sterling testified on behalf of Cook. Goines

appeared at the hearing to support Cook, but she did not testify. Shuttlesworth, the Taylor County Health Coordinator, did not testify at Cook's grievance hearing.

27. None of Cook's witnesses at the grievance hearing, except complainant, incurred any reduction in work hours or any other adverse employment consequences.

28. Because of various financial problems over the years, respondent has made several cuts in the Head Start budget. These reductions have often affected the number of months and hours per week for which various Head Start personnel were to be employed, as well as causing the elimination of positions.

CONCLUSIONS OF LAW

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

2. North Central West Virginia Community Action Association, Inc. is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of reprisal.

4. Respondent has articulated a legitimate non-discriminatory reason for its reduction of complainant's hours.

5. Complainant has not demonstrated that the reason articulated by respondent for cutting her hours is pretextual.

6. Respondent has neither discriminated against complainant nor taken reprisal against her by reducing her work hours. West Virginia Code, Section 5-11-9(i)(3).

DISCUSSION OF CONCLUSIONS

In fair employment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case complainant has established a prima facie case of reprisal. The parties have stipulated that complainant engaged in protected activity by testifying at a grievance hearing of respondent on June 19-20, 1986 filed by complainant's supervisor Cook which alleged race discrimination. The parties have stipulated further that complainant was notified on August 27, 1986 that her work hours would be reduced from 40 hours to 30 hours per week. Such facts are sufficient to establish a prima facie case of retaliation. See Frank's Shoe Store v. Human Rights Commission 365 S.E. 2d 251 (W.Va. 1986).

The Frank's Shoe decision appears to require that a reprisal complainant demonstrate as a portion of the prima facie case that respondent was aware of complainant's protected activity. Requiring a complainant to make such a showing has been strongly criticized. See Larson, Employment Discrimination Vol. III, §87.30 17-32. Indeed, the best source of evidence regarding what respondent is aware of would seem to be respondent itself. Accordingly, it would be more consistent with the traditional axioms underlying the law of evidence to conclude that proof regarding respondent's lack of knowledge should be included in respondent's burden. The Hearing Examiner urges the Commission to present this argument to the Supreme Court of Appeals. In the instant case, however, the result would not be affected because respondent clearly had knowledge of complainant's protected activity as of the date of Cook's grievance hearing. The rule as stated in Frank's Shoe could become problematic in future cases, but it does not affect the outcome of the instant case.

Respondent has articulated a legitimate non-discriminatory reason for cutting complainant's hours. Respondent has proven that its initial draft budget for the 1986-87 program year contained no reduction for complainant. In late January or early February 1986, respondent received a letter from Region III in Philadelphia, Pennsylvania, respondent's federal funding source, which directed that programs which provided for classes in excess of twenty children would not be funded. This requirement caused problems for respondent because the Monongalia County program which is administered by

the Board of Education through respondent, consisted of five classes of twenty-one children each. When Monongalia County could not be persuaded during negotiations to part with any money from an expansion grant, respondent submitted a revised budget which would have had the effect of reducing the number of children served by five. In April, 1986 respondent was notified by Region III that the revised budget was rejected because the five children had been eliminated from the program. Respondent already considered its budget to be of the bare-bones variety and, therefore, requested that Region III representatives meet with officials of respondent during an upcoming conference in Philadelphia. Such meetings took place on June 4 and 5, 1986. At the June 4 meeting, representatives of Region III expressed the opinion that respondent was overstaffed and that reductions could be made which would permit respondent to serve five additional Head Start enrollees without taking any portion of the funding awarded to the Monongalia program. Vincinanza, the Region III employee who supervised the Head Start staff, suggested that respondent could make cuts in the Health or Social Service staffing. At the June 5 meeting, which was requested by respondent to show how it could make any cuts in its budget, representatives of Region III pointed out a disparity in the number of children served in the various counties.

Given these instructions and the problem of serving 467 rather than 462 children with a maximum class size of 20, Alvaro again went to work on the budget. On June 9 and 16, Alvaro conducted meetings relative to the budget problems. At the June 9 meeting,

the general concensus was to make reductions in the Health Component Staff. At the June 16 meeting, Alvaro presented a budget plan which would reduce the months and hours of the Health Care Director at the agency headquarters, reduce the hours of complainant and Shuttlesworth, the Taylor County Health Coordinator, and eliminate the purchase of a bus. On June 18, 1986, respondent's Parent Policy Council approved the budget. Thereafter, respondent's Board of Directors and Region III approved said revised budget.

Complainant has not demonstrated that the reason articulated by respondent is pretextual. The testimony of complainant and her witnesses, because of their demeanor and various other problems, is less credible than the testimony of respondent's witnesses. Complainant's demeanor was unsure and her testimony was marred with contradictions. For example she attempted to testify that the relocation of her office to Belington was evidence of retaliation. She was forced to admit on cross-examination, however, that there were 40 children in the Belington program and only 20 in Phillipi, that is centrally located in her supervisor's territory, and that Belington is only fifteen minutes from Phillipi. Moreover, complainant testified that the Marion County Health Coordinator, who had responsibility for 100 children, had an aide to assist her with her duties. This point was expressly contradicted by the credible testimony of Woodward, who was the Marion County Health Coordinator during the relevant timeframe.

Respondent's articulated reason is buttressed by the record evidence regarding Cook's grievance hearing. The hearing was not

held until June 19-20, 1986, yet the budget cuts, including complainant's hours, were announced on June 16, 1986. Although officials at respondent had reason to believe that complainant would testify on behalf of Cook in advance of the hearing, clearly respondent could have no idea as to the nature of complainant's testimony or her role until the testimony was given. Thus the factor of timing appears to be virtually eliminated from the reprisal analysis. More important perhaps is the fact that two other employees of respondent testified for Cook, yet suffered no adverse employment consequences. On the other hand Shuttlesworth, the Taylor County Health Coordinator, did not assist Cook or testify on her behalf, yet her hours were cut in the same way as complainant's. For complainant to demonstrate that respondent's articulated reason is pretextual, these problems would have to be resolved, and they have not been.

Credit must be given, however, to complainant's attorney, Eates, for submitting the best post-hearing brief which this Hearing Examiner has seen from the Attorney General's office. Although the facts go against her client, the brief is a masterful attempt to interpret the record evidence and the relevant caselaw in a manner favorable to complainant. Certain specific points in the brief need to be addressed. First, complainant refers to the absence of evidence in the record as to the cost of educating five children. Phrased in that way, the absence of such evidence seems to be a glaring omission. The record reveals, however, that each of the five classrooms in Monongalia County were full, and, therefore, new

arrangements had to be made for the five additional children. Thus, in terms of the totality of the record, it appears that the cost would be substantial. In view of the directive from Region III regarding staff cuts, particurlarly in Health Programs for counties with smaller numbers of enrollees, the absence of evidence as to the cost to respondent for the additional children is unimportant. Clearly, respondent's entire Head Start funding was in jeopardy unless the directives of Region III were implemented, and budget cuts in personnel were necessary.

Complainant's brief also attempts to demonstrate pretext by referring to a letter from Davis of Region III regarding cuts in staff hours. The record reveals, however, that as respondent's Executive Director Dean testified, Davis was present at the June 4 meeting in Philadelphia at which general concepts were discussed, but Davis was not present at the June 5 meeting at which specific areas to cut were suggested. Moreover, the letter cited by complainant is based upon a faulty factual premise. Said letter questions the reason for cutting one position from 40 to 30 hours per week. The record evidence makes it clear, however, that not one but three positions were cut by respondent from 40 to 30 hours per week, including complainant's position, the Taylor County Health Coordinator, and the Health Care Coordinator position at agency headquarters. Thus, said letter from Davis is based upon a misunderstanding of the revised budget of respondent. The record also reveals that Davis was new at his job and that he entered this controversy in midstream. Complainant neither called Davis as a witness nor submitted

an evidentiary deposition from him. The letter from Davis is not sufficient to establish that respondent's reason for reducing complainant's hours is pretextual.

Complainant's brief also argues that the Taylor County reduction is not significant. Complainant contends that the Taylor County Health Care Coordinator was originally targeted for elimination. Complainant's contention is not accurate. In the budget originally submitted by Alvaro in November, 1985 made no changes in the hours of complainant or in the Taylor County personnel. The Region III memo regarding maximum class size, and the resulting heated negotiations with the Monongalia County Board of Education, caused Alvaro to submit a revised budget which resulted in the elimination of five children from the program and the consolidation of two Taylor County positions. The record is not clear as to which Taylor County employee would be eliminated, but in any event, said revised budget was rejected by Region III. After seeking and obtaining the input of Region III as to what budget cuts could be made, Alvaro then prepared the second revised budget which was then approved by all of the bodies which must approve budgets for respondent's Head Start program. Thus, it is not the case that the Taylor County position was arbitrarily raised to 30 hours while complainant was being cut. Instead, the record reveals the respondent was presented with severe and threatening budget difficulties and that respondent made the cuts which it believed that its federal funding source would approve. These budget cuts appear to have been made without regard to any consideration as to whether the individuals who occupied the positions,

if they were in fact occupied, played any role in supporting Cook's grievance. Once again complainant's counsel has crafted a clever argument, but the record evidence does not support a conclusion that respondent's articulated reason for reducing complainant's hours is a pretext for a retaliatory motive.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter, with prejudice.

James Gerl
Hearing Examiner

ENTERED: October 17, 1988