STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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August 27, 1986

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RE: Pearson v. Homer Laughlin China Co.
ER-466-80

Gentlemen:

Due to a clerical error, the Complainant was not served a copy of this Order. Herewith, please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

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, West Virginia, 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 thirty (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney (dlm)

Howard D. Kenney
Executive Director

HDK/mst

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LEYMAN PEARSON,

Complainant,

vs. Docket No. ER-466-80

HOMER LAUGHLIN CHINA COMPANY,

Respondent.

O R D E R

On the 8th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Victor A. Barone. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

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

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 21 day of April, 1986.

Respectfully Submitted,

Betty Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

#18

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

LEYMAN PEARSON,

Complainant,

VS. CASE NO. ER-466-30

HOMER LAUGHLIN CHINA COMPANY,

Respondent.

Approved VAS 12/30/85

HEARING EXAMINER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

PRELIMINARY MATTERS

This employment discrimination complaint was filed in 1980. Complainant, Leyman L. Pearson, alleged that he was fired by respondent in February, 1980, because of his race, black.

A pre-hearing conference was held on April 15, 1985, at which time the parties waived the presence of a hearing commissioner. (This waiver was again recited on the record by counsel at the commencement of the public hearing).

After the pre-hearing conference, the respondent raised a jurisdictional defense; i.e., that the complaint had not been filed within 90 days of the alleged act of discrimination.

Pursuant to the pre-hearing order and by agreement of the parties, this defense was treated as a motion to dismiss. On July 29, 1985, the Hearing Examiner issued a decision recommending dismissal of the complaint on the grounds that it had not been timely filed. By order entered on September 24, 1985, the Human Rights Commission rejected the Examiner's recommendations and returned the case for reassignment and hearing.

Pursuant to that order, a public hearing was held on October 31, 1985, at the Hancock County Courthouse in New Cumberland, West Virginia. The complainant was the sole witness in his behalf. Respondent presented three witnesses. At the close of the hearing, the Hearing Examiner asked for the parties' briefs, proposed findings and conclusions by December 1, 1985. This deadline later was extended to December 10, 1985. The respondent submitted its post-hearing brief with proposed findings and conclusions on December 9, 1985. No post-hearing submission has been received from the complainant.

The Hearing Examiner has now considered the transcript of testimony totaling 301 pages, the exhibits appended thereto and respondent's post-hearing submission.

ISSUES - CONTENTIONS OF THE PARTIES

The pertinent portion of the complaint reads as follows:

> "1. I was discharged on February 5, 1980, for incidents that happened in August, 1979.
>
> 2. The Respondent Company said I was discharged for excessive absenteeism.
>
> 3. I believe that I was discriminated against and discharged on the basis of my race, black, because:
>
> a. I was the only black employed by the security department.
>
> b. I received two final warnings and discharge on the same day, February 5, 1980.
>
> c. White employees with more sick time off and more employee warning notices than myself have not been discharged.
>
> d. The Respondent company also refused to accept my Doctor's excuse whereas, caucasian employee Doctor's excuses are accepted."

Respondent denied any discriminatory motivation in the discharge. At the hearing and in its post-hearing brief, respondent also renewed its jurisdictional defense based upon complainant's purported failure to file the complaint within the 90 days after the alleged act of discrimination as required by W.Va. Code 5-11-10.

FINDINGS OF FACT

1. Complainant is a black male who resides in East Liverpool, Ohio. He has been unemployed since 1980 when he was discharged by respondent.

2. Respondent is a corporation engaged in the manufacture of china in Hancock County, West Virginia. At the time the events material to the case occurred, the respondent had over 1,000 employees. The company in 1980 had an affirmative action program which was subject to review by the Federal Equal Employment Opportunity Commission (EEOC). The company made quarterly reports to the EEOC and had been found in compliance with its requirements.

3. Complainant was employed by respondent in December, 1978, and was discharged on or about February 5, 1980. His job while employed by respondent was as a security guard. He worked primarily the midnight to 8:00 A.M. shift. During his employment he was the only black in the security department, which consisted of approximately 10 to 12 employees.

4. The duties of a security guard at the plant involved making rounds of the plant premises for purpose of a fire watch, protection against vandalism and theft, monitoring the sprinkler system, and generally serving the function of watchman. The guards worked in two-man teams, each making

the rounds for an hour while the other remained at the guard station. The plant covers an area of approximately 30 acres or 1.5 million square feet. The rounds involved making a circuit of designated check points or "key stations". By use of a portable key-punch clock carried on the rounds, the guard could record on a tape the time of his arrival at each key station. There were 17 key stations. When not making rounds, the guard remaining at the guard base station would answer the phone and keep a record of employees reporting on and off for work. During complainant's shift, he would make rounds at 1:00 A.M., 3:00 A.M. and 5:00 A.M. (the last round ending at 6:00 A.M.); he would then man the phone at the base station until 8:00 A.M. quitting time.

5. The respondent's general superintendent, Jon Bentley, testified that perhaps the security department's most important function was that of "fire watch"; that this function was emphasized by the plant's insurance company, which at times would even audit the tapes of the punch clock to insure that the guards were making their rounds. A one-page set of rules and guidelines for the guards included instructions in case of fire, and placed emphasis on such matters as reporting to the base station if a guard was gone for more than one hour. The rules also included the following instructions:

"Log all report offs and ons and no matter how often. Every day if necessary. This is an absolute must.

* * *

"Do not desert your clock or guards post!"

Bentley testified that prior to complainant's discharge, two white security guards had been fired by the company for missing rounds; that missing a round and not having someone "cover it" was a very serious offense.

6. Complainant was fired on February 5, 1980, for the stated reasons of (1) not making rounds, (2) leaving work early without permission and not notifying his supervisor and (3) excessive absenteeism. The decision to fire complainant was made by general superintendent Bentley after the security guard supervisor, George Mellinger, brought the complainant's job performance to his attention and discussed it with him.

7. The same guard supervisor, Mellinger, had fired complainant -- or at least told complainant he was fired -- in November of 1979 apparently over an incident involving a doctor's excuse for sick leave. This decision, however, was overruled by Mellinger's superior (Bill Bowyer, Assistant Plant Superintendent) after complainant had gone to the local NAACP apparently with the complaint that the action was racially motivated. General Superintendent Bentley was out of town at the time but was consulted by Bowyer and

concurred in Bowyer's decision to overrule the November discharge. Bentley testified that complainant's race was a consideration in overruling the discharge; that complainant was treated more leniently than a white would have been.

8. Complainant testified that a fellow security guard, Jim Woodrow, told him that Mellinger had said in November, 1979, "I wish I'd never hired a nigger", or words to that effect. The parties indicated that Jim Woodrow still works at the plant; however, neither party called him as a witness. The evidence is that George Mellinger no longer works at the plant but his place of residence was not indicated, and accordingly, the record is unclear as to the ability of the parties to subpoena him. At any rate, neither party called him as a witness.

9. The events leading up to the discharge of complainant in February, 1980, are as follows:

(a) Complainant missed seven days of work in January, 1980. The first of these seven, on January 12, was an unexcused absence; the other six in late January were due to illness. There is no dispute that complainant was in fact ill, apparently from a severe case of the "flu" with bronchitis. Complainant introduced a doctor's note which stated: "Ill from 1/23 to date 1/28/80 . . . OK for work 1 Feb. 80".

(b) Further, the company records and logs indicate that on January 15, 1980, complainant missed 11 key stations on his 1:00 A.M. round; on both January 20 and 21, he missed his 3:00 A.M. round completely; and on February 2, he missed 10 key stations on his 1:00 A.M. round. Complainant testified that all of these missed keys and rounds were due to illness. Respondent apparently concedes this as indicated in its proposed finding of fact No. 6. It is noted that January 20 and 21, when complainant missed two complete rounds, immediately preceded six consecutive days missed due to illness.

(c) Finally, on February 2, 1980, after plaintiff had returned to work, he was scheduled to work his midnight to 8:00 A.M. shift. Prior to coming to work that night, he called Ken Beaver, Assistant Supervisor of security guards and asked Beaver to drive him to work because his (complainant's) car was not operable. Beaver did pick up plaintiff and take him to work. (Complainant testified that he and Beaver, a white, were friends who hunted and fished together). On the way to work, complainant told Beaver that in order to get a ride home he (complainant) might have to leave early to ride with another employee whose quitting time was 6:00 A.M. There is a dispute as to what Beaver's answer was. Complainant says Beaver told him it was "OK" to leave early as long as he got his post covered. Respondent

says Beaver's answer was, in effect, "if you leave early, you are putting your job on the line." (Beaver, like Mellinger, does not now work for the respondent but his residence and whereabouts were not accounted for. Neither party called him as a witness). Complainant testified that he wanted to leave early because if he waited until 8:00 A.M., he would not have a ride home and would have to walk 5 miles, which he did not want to do in the February cold while still suffering from the after-effects of the flu. At any rate, complainant did leave work at 6:00 A.M. that morning. He says he tried to call Ken Beaver to tell him he was leaving but got no answer at Beaver's phone. Complainant says that despite being unable to contact Beaver, he left because Beaver had earlier said on the way to work that complainant could leave early as long as he had his post covered. Complainant insists he had another employee cover his post for him when he left.

10. When complainant reported to work the following day, he says Ken Beaver started to "find things wrong". Beaver handed complainant two forms entitled "Employee Warning Notice". The forms were signed by George Mellinger and both were marked "final warning". The first said that complainant "did not complete rounds". The second said "left job without permission. Did not contact immediate supervisor." As noted above, complainant was then notified, either that day or the next, that he was fired, and he was given his final paycheck on February 8.

11. The evidence as to respondent's sick leave and vacation policies is that employees in complainant's category were allowed 10 sick days a year with pay; and after one year of employment, 10 vacation days a year with pay. General Superintendent Bentley testified that the sick days are not considered available to "take"; they can only be used for genuine sickness or medical emergencies. These sick days may be accumulated from year to year with seniority.

12. The evidence shows that in 1979, complainant took five vacation days in August and five in December. The five in August were taken before complainant had been with the company one year. Also in 1979, he had 10 days absent due to sickness, 4 days absent for which no explanation appears, and two days of unexcused absence. The total of days absent from work in 1979 was 26. As previously noted, complainant then missed 7 days in the first month of 1980.

13. The first allegation in the complaint is that: "I was discharged on February 5, 1980, for incidents that happened in August, 1979." This allegation was not proved, as complainant was unsure about "incidents" that happened in August, 1979. Complainant may have meant November, 1979.

14. The crux of the complaint is contained in paragraphs 3c. and 3d., wherein complainant alleges that white employees with more sick time off and more warning

notices were not discharged and that the company refused to accept his doctor's excuses while the doctor's excuses of white employees were accepted. The evidence indicates that the only white employee who may have had a greater or comparable amount of sick time than complainant (in the relevant period) was one Clark Geer, who had been employed by the company since 1959 and had accumulated over 60 days of sick leave. Complainant's counsel apparently concedes that Geer's situation is not relevant for comparison with complainant, who had been employed slightly more than one year. This inference is drawn from the fact that counsel discontinued cross-examination about Geer's sickness record when he learned that Geer was a 20-year employee. General Superintendent Bentley testified that Geer was a long-time employee with a steady work record who had encountered an accident or lengthy illness and that this was one of the situations contemplated by the sick leave policy. Complainant's counsel elicited evidence about the attendance records of six other security guards. Three of them had no sick days in the relevant period and the other three had only one each.

15. Complainant's allegations and evidence about warning notices are somewhat inconsistent. He alleged in his complaint that white employees with "more warning

notices" were not fired, but his testimony at the hearing was that he did not know of any other employee who received any warning notices.

16. From the evidence of record, it appears that the company did accept complainant's doctor's excuses, in the sense that he was credited and apparently paid for a sick day if he had a doctor's excuse for it (although there apparently was some dispute in November, 1979, which has been alluded to above).

17. General Superintendent Bentley testified that when Mellinger came to him on or about February 5, 1980, to discuss complainant's work, he, Bentley was not informed that sickness may have been the reason for the missed rounds.

18. With respect to respondent's statute of limitations defense, there is no question that the verified complaint form was signed by complainant on May 7, 1980, and was not received by the Commission until May 23, 1980. However, an "Employment Complaint Background Information Questionnaire" was signed by complainant and notarized on April 6, 1980. A handwritten notation made on that form reads "received 4/8/80" under the words "Att. Leona Lockard." The Hearing Examiner assumes this was the date of receipt at the Commission office.

19. Complainant has been unemployed since his discharge by respondent in February, 1980. He has had virtually no income other than a few hundred dollars from hunting, trapping and digging ginseng. Although complainant has submitted no post-hearing brief, it is assumed that the relief requested includes job reinstatement with back pay.

COMMENT ON THE FINDINGS OF FACT

The Hearing Examiner would have preferred to hear more evidence from both sides. As noted in the discussion of preliminary matters, complainant was the sole witness on his behalf. There is no indication that he attempted to procure the attendance - voluntary or involuntary - of any other witness. Inasmuch as a complainant has the burden of proving his case by a preponderance of the evidence, he makes his task doubly difficult when he calls no corroborrating witnesses and his own recollection of events is somewhat shaky. An example of how additional evidence could have been useful is complainant's testimony that a fellow security guard, Jim Woodrow, told complainant that the security guard supervisor, George Mellinger, had said he would "never hire another nigger" or that he "wished he had never hired a nigger". Counsel stipulated that Woodrow still works for the respondent. The complainant's testimony about this statement, although it is "hearsay within hearsay" was admitted over respondent's objection. If true, the

statement attributed to Mellinger would have obvious significance. However, the Hearing Examiner is extremely reluctant to place substantial weight on a double hearsay statement when a witness who could have corroborrated it (Jim Woodrow) was amenable to process, is still employed at the plant less than 15 miles from the place of hearing, but was not called as a witness by either party. Similarly, although it was agreed that Mellinger and Ken Beaver no longer work for the company, there was no real attempt to account for their present whereabouts. The respondent argues in his post-hearing brief that since these people no longer work for the company, they are no longer under the company's control to be produced as witnesses. Of course, whether presently employed or not, respondent (or complainant) could have subpoenaed these individuals assuming they could be served within the Commission's territorial jurisdiction. However, as respondent correctly suggests, the burden is on the complainant to prove his case, not on the respondent to disprove it.

In remarking upon complainant's shaky recollection of facts, the Hearing Examiner specifically refers to such examples as complainant's apparent inability to recognize the "Employment Complaint Background Information Questionnaire" which he signed, his confusion or uncertainty about dates, and several sworn statements in his complaint which were unsubstantiated or contradicted at the hearing.

CONCLUSIONS OF LAW

The stated reasons for complainant's discharge were (1) missing rounds, (2) leaving work without permission and not contacting his supervisor and (3) excessive absenteeism. It is fundamental that in order to prevail on his charge of race discrimination, complainant should be prepared to show that whites in the same circumstances were treated more leniently. Complainant was the only black employee in the security guard force and there were only 10 to 12 security guards. Complainant did not produce evidence of any white employees with the same or a comparable work record; i.e., a combination of multiple offenses.

The plant general superintendent testified that missing rounds and leaving work early without permission were serious offenses. The written rules for security guards place emphasis on these factors. One rule exclaims: "Do not desert your clock or guards post!". The same witness testified that two white guards had been fired for missing rounds in the past.

Complainant's testimony was that illness was the reason for his missed or incomplete rounds. This is apparently not disputed by respondent. The general superintendent, who made the decision to discharge after consultation with Mellinger, was apparently not aware of the sickness as a possible explanation for the missed rounds. Whether his decision would have been different had he known the full

circumstances is a matter of conjecture. He did testify that if a guard becomes ill on the job and cannot make or complete his rounds, he should notify his supervisor and make sure the round is covered by someone else. He also said that even though employees may use as many as 10 sick days a year, they are not necessarily "entitled" to these days, and employees who continually use sick leave days do so at the risk of their jobs.

Even assuming, however, that Bentley's decision would have been not to discharge if he had known all of the facts and circumstances of the missed rounds, this does not mean that complainant is now entitled to relief. Complainant is entitled to protection from a racially motivated discharge. The human rights laws do not immunize him from the effects of an unwise, uninformed or even unfair management decision. For reasons stated above, complainant on this record has not met the burden of proving that his discharge was because of his race. Again, complainant has made his burden more difficult by calling no witnesses other than himself.

With respect to the respondent's statute of limitations defense, there is no question that the verified complaint form; i.e., the complaint ultimately served upon the respondent, was not filed within 90 days after the alleged act of discrimination. However, the "Employment Complaint Background Information Questionnaire" was filled out, signed, verified and returned to the Commission in April of

1980, approximately 60 days after the alleged discriminatory act. In its order reopening this case for hearing after the Hearing Examiner's recommended dismissal, the Commission did not state its reasons. It is assumed, however, that the Commission considers the executed Employment Complaint Background Information Questionnaire to be a complaint for purposes of the statute and under its own rules. Inasmuch as the Hearing Examiner after a full hearing recommends denial of any relief to complainant, a ruling on the statute of limitations defense is not necessary.

The Hearing Examiner's recommended conclusions and order are as follows:

1. Complainant has failed to prove by a preponderance of the evidence that he was discharged because of his race.

2. The complaint should be dismissed.

Dated this 31st day of December, 1985.

Victor A Barone

VICTOR A. BARONE
Hearing Examiner