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

January 22, 1986

Mike Kelly, Esq.
1116-B Kanawha Boulevard, E.
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Katherine A. McMullen, Esq.
Assistant Attorney General
Room 26-B State Capitol
Charleston, WV 25305

Paul Richard Hull
Assistant Attorney General
Room 26-E
State Capitol
Charleston, WV 25305

RE: Gene Taylor & Mildred Hawkins
V WV Department of Finance &
Administration/Case Nos.: ER-25-78 & ER-26-78

Dear Mr. Kelly, Ms. McMullen and Mr. Hull:

A clerical error was discovered in the Final Order of the Commission. The Docket No. on the Final Order was incorrect and should be ER-25-78 and ER-26-78. A corrected copy of just the Commission's Order without the attached Hearing Examiner's Findings of Fact and Conclusions of Law is enclosed.

Sincerely,

Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

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January 3, 1986

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Assistant Attorney General
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Paul Richard Hull, Esquire
Assistant Attorney General
Room 26-E, State Capitol
Charleston, WV 25305

RE: ES-595-83/Jean Taylor & Mildred Hawkins V WV Dept. of Finance & Administration.

Dear Mr. Kelly, Ms. McMullen and Mr. Hull:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Jean Taylor and Mildred Hawkins V West Virginia Department of Finance and Administration/ES-595-83.

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

JEAN TAYLOR and
MILDRED HAWKINS,

Complainants,

vs. Docket No.: ER-25-78
ER-26-78

WEST VIRGINIA DEPARTMENT OF
FINANCE AND ADMINISTRATION,

Respondent.

ORDER

On the 11th day of December, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner George C. Duffield. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law by deleting in paragraph 7(c) of the Conclusions of Law the figure "$1,500.00" and substituting therefor the figure "$5,000.00" as incidental damages awarded to each complainant.

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, except insofar as they are amended by 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 19 day of Dec., 1985.

Respectfully Submitted,

CHAIR/~~VICE-CHAIR~~
West Virginia Human
Rights Commission

WEST VIRGINIA SUPREME COURT OF APPEALS

FOR THE

WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEAN TAYLOR AND
MILDRED HAWKINS,

COMPLAINANTS.

VS.

CASE NO. ER-25-78
ER-26-78

WEST VIRGINIA DEPARTMENT
OF FINANCE AND ADMINISTRATION,

RESPONDENT.

HEARING EXAMINER'S FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

I.

INTRODUCTION

On July 25, 1977, the complaints filed herein were docketed with the West Virginia Human Rights Commission charging the respondent with unlawful employment discrimination on the basis of race as prohibited by West Virginia Code 5-11-9 (a). The complaints were served on respondent on July 26, 1977.

After failure of conciliation, a hearing on the

complaints was had on July 28, 1985, the undersigned Hearing Examiner George C. Duffield, the complainants being present in person and by their counsel, Mike Kelly, and the respondent being represented by its counsel, Paul Richard Hull and Catherine A. McMullen, both assistant attorneys general.

II.

ISSUES

1. Whether respondent, West Virginia Department of Finance and Administration, unlawfully discriminated against the complainants, as prohibited by West Virginia Code 5-11-9 (a), by enforcing disciplinary measures against them that were more severe than those imposed against white persons who committed similar or more egregious offenses.

2. If the respondent did unlawfully discriminate against the complainants, whether complainants are entitled to back pay, incidental damages and removal of all mention of the disciplinary measures from their personal files.

III.

FINDINGS OF FACT

Based upon the evidence adduced at the hearing, the following facts were presented:

1. The complainants, Jean Taylor and Mildred Hawkins,

are Black females and "persons" as that term is defined by West Virginia Code 5-11-3 (a).

2. The respondent, West Virginia Department of Finance and Administration, is a department of the State of West Virginia and an "employer" as that term is defined by West Virginia Code 5-11-3 (d).

3. Taylor, as of the date of hearing, had been employed by the State of West Virginia as a custodian for 13 years. Hawkins has been similarly employed since 1969.

4. In July, 1977, complainants both worked in the state building located at 112 California Avenue, Charleston, Kanawha County, West Virginia. They worked Monday through Friday, from 5:00 p.m. to 10:00 p.m.

5. On July 12, 1977, between 9:30 p.m. and 10:00 p.m., the complainants took a break and sat down at a table on the fourth floor of the building. At the time they sat down, complainants had completed their regularly assigned duties, except for putting away their cleaning utensils and materials. Richard Powell, another custodian and who is also Black, stood near the table at which the complainants were sitting. He, too, was taking a break.

6. A little after 9:30 p.m., Charles Hodge, complainants' supervisor, and Tom Bailey, Hodge's supervisor, came on to the floor and saw complainants sitting at the table and Powell standing nearby.

Bailey asked complainants if they were through with their work. They told him that they were, except for putting away their cleaning supplies. Bailey and Hodge then left the floor. Hodge had not said anything to complainants in Bailey's presence.

8. A few minutes later, Hodge returned to the floor and informed complainants and Powell that they were being suspended for playing cards while on duty.

9. Hodge admitted that he didn't see any cards near or in the possession of complainants or Powell when he came on the floor with Bailey. The complainants,said Hodge, "wasn't doing anything as I saw it". He also confirmed that the complainants were sitting in an open area, in plain view, and did not appear to be attempting to conceal their break.

10. According to Hodge, who was called by respondent, when he and Bailey left the floor Bailey told him that he intended to discipline the complainants and Powell. He wrote up a discipline notice and had Hodge sign it. The idea of disciplining complainants did not emanate from Hodge, their immediate supervisor.

11. Hodge further admitted that complainants had completed their regularly assigned duties that evening. Though custodians were frequently assigned extra duties by Hodge when a fellow employee was sick or on vacation, Hodge testified that he had not assigned complainants any extra duties that evening.

12. When she arrived home after work that evening, complainant Hawkins called Bailey at his home to ask him why she and her co-worker were being suspended. Bailey did not give a responsive answer, so the next morning the complainants and Powell asked again in person. Again, Bailey was not responsive, and merely reaffirmed that they would be suspended "indefinitely".

13. After attempting to resolve the matter with Bailey, the complainants and Powell went to the office of Charles William Snyder, then the Director of the General Services Division of the respondent agency. Snyder had the authority to approve or disapprove all disciplinary action intended to be imposed against custodians.

14. When complainants and Powell explained the circumstances of the discipline to Snyder, he called Bailey and asked Bailey to come to his office. Snyder admits that Bailey had originally accused complainants of playing cards and intended to impose a one-week suspension against them. Upon being questioned by Snyder, however, Bailey confirmed that he actually had not observed complainants playing cards. Snyder, thereupon, reduced complainants' suspension to three days for "unauthorized sitting". He dismissed the charge against Powell since there was no allegation that Powell had, in fact, sat down.

15. Snyder testified that he affirmed the discipline, albeit with reduced severity, out of the necessity to uphold

"departmental policy" against unauthorized sitting. Snyder admitted, however, that there was no written policy prohibiting evening employees from taking breaks. This was likewise admitted by Hodge, who agreed that there wasn't any written break policy, one way or the other, applicable to evening custodians. Moreover, respondent's own employee handbook states that "To maintain efficiency it is desirable for employees to break ; the section does not exclude breaks or specifically prohibit breaks for evening employees.

16. The complainants, on the other hand, testified that in actual practice all custodial employees regularly took breaks, especially after their work was done. Neither complainant had been informed that breaks were not allowed, nor had they even been given a disciplinary warning for taking an unauthorized break, nor were they aware of any other employee disciplined for similar activity. Powell likewise testified that he was not aware of a break policy and that, in regard to breaks, employees "did whatever they felt like doing" so long as they completed their work. He observed many custodians, black and white, take a break by sitting down prior to quitting time, though no one other then complainants were ever disciplined for it.

17. Based on the credible evidence, the Hearing Examiner finds as a fact that there was no policy prohibiting evening custodians from taking a break after their work was done.

18. Complainants' suspension took effect on July 19, 20, and 21, 1977.

19. At least two white male employees of respondent, John Carter and John Quigley, committed more egregious offenses than complainants but were less severely disciplined. John Quigley failed to report to work from tuesday, January 10, 1978 until 10:30 a.m. on Thursday, January 12, 1978, but received only a verbal warning. On May 14, 1980, John Carter was given a verbal warning for repeated tardiness. In both instances the supervisor of the disciplined employee was Tom Bailey. Additionally, Tom Bailey's son, who worked under Charles Hodge, was observed committing various infractions about which Hodge spoke to the senior Bailey. The supervisor's son, however, "never lost a day's work and he never lost a minute's payroll".

20. Respondent's agent, Hodge, admitted that he had no problems with complainants either before or after the incident complained of and that both complainants are "good workers". Neither complainant has had any other discipline imposed against her, not even a verbal reprimand.

21. As a result of the suspension, complainant Taylor lost wages in the amount of $57.75 and complainant Hawkins in the amount of $60.00.

22. As a result of their suspension, both complainants felt angry, upset, hurt and humiliated.

Shepherdstown court, and "the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason" for its action against the complainant. 309 S.E.2d at 352.

Here, there can be no question but that the complainants have made out a prima facie case of discrimination. First, it is clear that the complainants, black females, fall within the protection of the Act on the basis of their race.

Second, it is undisputed that the complainants were disciplined during the course of their employment, suffering a three-day suspension and loss of wages.

Finally, it is clear that nonmembers of the protected group, such as John quigley, John Carter and Tom Bailey, Jr., were disciplined less severely than the complainants though they engaged in similar, or even more egregious, conduct. Here, these other persons were given verbal warnings for, in one instance, missing two days of work on unexcused leave, and the other, repeated tardiness. Likewise, no discipline was given to Tom Bailey, Jr., even though a credible witness (Richard Powell) observed that he failed to do his work and that his supervisor (Charles Hodge) brought this fact to the attention of Mr. Bailey's father.

The facts in this case are somewhat analogous to those found in State v. Logan-Mingo Area Mental Health Agency, supra. There, a white employee engaged in far more serious improper conduct than did the Black complainant. Moreover, the Human

Rights Commission found the Black worker was held to a higher standard of performance than her white co-worker since only a few infractions caused her discharge while the White employee was allowed to accumulate more serious infractions over a longer period of time. This "evidence of inconsistent treatment" said the Court, is "sufficient to meet the initial burden of raising an inference of unlawful discrimination". 329 S.E.2d at 86.

As in Logan-Mingo, the complainants here have produced evidence of inconsistent treatment that is plainly sufficient to raise the inference of unlawful discrimination.

B. THE REASONS PROFFERED BY RESPONDENT FOR IMPOSING DISCIPLINE AGAINST THE COMPLAINANTS ARE PRETEXTUAL AND UNWORTHY OF CREDENCE.

Having established their prima facie case, the complainants created a "presumption that the employer unlawfully discriminated against" them. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Shepherdstown, supra, at 352.

To rebut the presumption, it was incumbent upon the respondent to articulate a legitimate nondiscriminatory reason for the discipline, such as its "justifability". Logan-Mingo Area Mental Health Agency, supra, at 86, or to "advance a permissible rationale for treating the ~~compared~~ compared employees

differently". Moore v. City of Charlotte, 754 F.2d 1100, 1106 (4th Cir. 1985). At the very least, the respondent had the burden to produce evidence that would provide "insight into the discretionary factors underlying [its] decision to discipline two individuals differently". Moore, at 1106.

Though the burden on respondent is only one of production, to accomplish it the agency "must clearly set forth through the introduction of admissible evidence the reason" for their action. Burdine, at 254. The "explanation provided must be legally sufficient to justify judgment for the defendant". Ibid.

Here, respondent utterly failed to articulate any explanation for the difference in treatment between complainants and their white co-workers. Not one iota of evidence was offered that in any way justifies or explains why complainants received a 3-day suspension for sitting down after completing their work while white employees were issued only verbal warnings for unexcused absences and repeated tardiness.

Having failed to meet its burden of production to "raise a genuine issue of fact as to whether it discriminated against" complainants, Burdine at 254-255, complainants' prima facie case stands unrebutted as proof of intentional discrimination and the Hearing Examiner may conclude that discrimination has been established as a matter of law. See Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 609 (6th Cir. 1982), cert. dismissed 103 S. Ct. 1534 (1982).

Even assuming respondent met its above-described burden, reviewing the testimony and exhibits as a whole, complainants have produced clear and convincing evidence, from credible witnesses, as well as the respondent's own documents, that they were accorded different treatment than non-protected members who engaged in similar activity. In Burdette v. FMC Corporation, 566 F. Supp. 808 (N.D. W. Va. 1983) District Judge Haden framed the ultimate issue of an unlawful discipline case as follows:

> The ultimate issue in the area of disparate disciplinary treatment has been framed generally as follows: Whether members of a protected group were accorded different treatment than nonmembers engaged in similar activity.
>
> 566 F. Supp. at 815.

Not only were the complainants treated differently from Quigley, Carter and Tom Bailey, Jr., but it is very unclear that they committed any infraction whatsoever. Neither of respondent's witnesses could testify with any degree of certainty that there was a policy prohibiting breaks for evening custodians. The complainants, and Powell, however, testified that all custodians took breaks and that it was a common practice which had not at any time previously given rise to discipline.

Given respondent's inability to articulate a legitimate reason for the discipline imposed on complainants, complainants have met their burden of showing by a preponderance of the

evidence that the respondent discriminated against them on the basis of race.

Once a complainant had established that she was a victim of an unlawful discriminatory practice, she is entitled to such relief as will make her "whole for [the] injury suffered". Albermarle Paper Company v. Moody, 422 U.S. 405 (1975).

In West Virginia, such relief includes back pay, W. Va. Code 5-11-10, Logan-Mingo, Pearlman v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145. Additionally, the Human Rights Commission may award affirmative relief, such as ordering the expungment of the discriminatory discipline from complainants' personnel files, and attorney's fees. See Human Rights Commission Administrative Rules 9.02(a) and (b) (1).

Here, it is undisputed that complainants suffered loss of wages, humiliation and loss of personal dignity as a result of respondent's acts and are entitled to an award such as will make them whole, including cleansing of their record and an award of attorney's fees and costs.

CONCLUSIONS OF LAW

1. The respondent is an "employer" within the meaning of W. Va. Code 5-11-3(d).

2. The complainants are citizens of the State of West Virginia and "persons" within the meaning of W. Va. Code 5-11-3(a).

3. The West Virginia Human Rights Act is violated when an employer disciplines a nonmember of a protected group less

severely than a protected member though both engaged in similar conduct or the nonmember engaged in more egregious conduct.

4. The complainants made a prima facie case showing that respondent unlawfully discriminated against them because of their race by imposing more severe discipline against them than against non-protected members who engaged in similar or more egregious conduct.

5. The respondent failed to articulate a legitimate nondiscriminatory reason for imposing such discipline against the complainants.

6. What reasons were articulated by the respondent to explain its actions were shown by a preponderance of the evidence to be pretext and that the respondent was more likely motivated by an unlawful discriminatory reason.

7. It is hereby recommended that the Human Rights Commission find as follows:

a. Each of the complainants are entitled to back wages: in the amount of $57.50 for complainant Taylor and $60.00 for complainant Hawkins.

b. Complainants be awarded pre-judgment interest in the amount of $50.73 for Taylor and $52.69 for Hawkins.

c. Each of the complainants be awarded $1,500.00 as incidental damages for the humiliation, emotional and mental distress, and loss of personal dignity suffered as a result of respondent's acts.

d. Within 30 days after the adoption of this Order by the Human Rights Commission, the respondent shall expunge all reference to the discriminatory discipline giving rise to this matter from complainants' personnel records.

e. Complainants are entitled to an award of attorney's fees and costs in the amount of $1,685.00 as indicated by the attached affidavit.

Attached hereto is affidavit of complainants for Attorney's fees and costs.

Respectfully submitted this _____ day of November, 1985.

George E. Caulfield
Hearing Examiner

AFFIDAVIT FOR ATTORNEY FEES AND COSTS

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Mike Kelly, counsel for the complainant in this action, hereby state under oath as follows:

1. The following is a true and actual summary of my time spent in litigating this action as compiled from my time records routinely kept throughout the duration of this matter:

Date(s)	Activity	Hours
April 11, 1985	Review file, interview complainants	1.5
April 15, 1985	Letter to counsel, meet complainants	0.3
April 27, 1985	Review file, draft discovery	1.0
May 16, 1985	Motion to Compel	1.5
May 25, 1985	Review work done	0.5
June 10, 1985	Prepare for depositions	1.0
June 10, 1985	Depositions	1.0
June 13, 1985	Draft answer to discovery	1.0
June 13, 1985	Review complete file	1.0
June 27, 1985	Prepare for hearing	4.0
June 28, 1985	Hearing	3.5
September 2, 1985	Read transcript/documents	3.0
September 4, 1985	Draft brief	6.0
September 10, 1985	Research, complete brief	3.0
	TOTAL HOURS	26.3
	x $60 per hour	
	TOTAL	$ 1,578.00

2. I have been a member of the Bar of the State of West Virginia for eight years and have been engaged in the practice of civil rights law for a combined period of two years.

3. Given the time and labor required in this action, the difficulty of the questions involved, the results obtained, and the fee customarily charged in the Kanawha Valley area for similar legal services by attorneys of similar experience, a fee of $60 per hour in this action is reasonable.

4. The costs expended in this action on behalf of complainants amount to $107, which is the cost of the depositions.

5. That the total amount due and owning to the Appalachian Research and Defense Fund for attorney fees and costs is:

Attorney fees (26.3 hours x $60/hr.)	$ 1,578.00
Costs	107.00
TOTAL AMOUNT DUE	$ 1,685.00

Mike Kelly

MIKE KELLY
1116B Kanawha Blvd., East
Charleston, WV 25301

Taken, sworn to, and subscribed before me this 11th day of September, 1985.

My Commission expires January 25, 1993.

Kerry K. DeMasters
Notary Public