BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LINDA L. TAYLOR,

Complainant,

v. DOCKET NUMBER(S): ES-30-90

INCO ALLOYS INTERNATIONAL, INC.,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on March 26 and 27, 1991, in Cabell County, at the Huntington City Council Chambers, City Hall, Huntington, West Virginia, before Gail Ferguson, Hearing Examiner. The public hearing re-convened on May 16, 1991 and the matter concluded on May 17, 1991

The complainant, Linda L. Taylor, appeared in person and by counsel, Dwight J. Staples, Esq. The respondent, INCO Alloys International, Inc., appeared on March 26 and 27, 1991 by its representative, Mary Lou Zirkle and on May 16 and 17, 1991 by Larry Music and by counsel, Evan Jenkins, Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance

with the findings, conclusions and legal analysis of the hearing examiner and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

FINDINGS OF FACT

1. The respondent, INCO Alloys International, is primarily engaged in the production of various goods in West Virginia.

2. Respondent's hourly labor force has several departments including, but not limited to, the Primary Mill, Cold Draw, Machine Shop and Melting Department.

3. Linda Taylor is a female initially employed by the respondent from April, 1978 through October or November, 1980. All employees served a 60 day probationary period. During that initial employment period, the complainant successfully completed her probationary period and became a full-time employee with the respondent. From 1978 through 1980, the complainant worked in three departments: Shipping, Janitorial Service and Cold Draw.

4. On or about September, 1980, the respondent had a major layoff of employees whereby approximately 700 people lost their jobs. Conley Plybon, a male, and the complainant were laid off

during this major reduction in workforce with no recall rights under the collective bargaining agreement.

5. On February 13, 1989, the complainant was rehired by the respondent. The complainant had lost her recall rights under the contract primarily because of the length of time she was laid off. Accordingly, the complainant was considered a new employee and was placed on a 90 working day probationary period. Being a probationary employee meant the complainant had to successfully complete the 90 day probationary period before she could become a full-time employee and a member of the Union. Mr. Plybon was also rehired as a new employee on February 13, 1989 under the same terms as complainant.

6. During the February, 1989 hiring period, the new employees were advised that they would receive three evaluations. The evaluations were to be given at the end of 30, 60 and 90 days. The employees also received an information manual which stated:

> Probationary Period - You should know that, as a new employee, you will be on probation until you have worked your full regular work schedule on each of 90 days. During your probationary period, you will have no seniority rights. Your conduct and performance during these 90 working days will determine whether or not you will be retained as a regular employee.

The new employees, however, were never promised or told that evaluations would actually be reviewed with the individual employee.

7. All probationary employees went through a one week orientation period. During that week, the probationary employees reviewed films on safety and were informed about some of the policies of the respondent. After her five day orientation period, the complainant worked in Cold Draw for two weeks, then she was sent to

Machine Shop for two weeks. After the orientation, Conley Plybon went to work in the Machine Shop and worked there for four weeks.

8. Probationary employees were sometimes placed in the "Unassigned Pool" or the "None Department" after the orientation. That meant that the respondent would temporarily assign employees or float employees to other areas.

9. During the first two weeks of the complainant's tenure in Cold Draw, her supervisor was Mac Roberts. The complainant worked as a laborer, and her duties included sweeping, taking out trash, picking up wire and barrels, cleaning tracks and other labor jobs. In Cold Draw, the complainant worked with Sharon Wallace on a daily basis. The complainant did not receive an evaluation for the first two weeks she worked in Cold Draw.

10. The complainant worked her second two weeks in the Machine Shop. Her supervisor was Wendell Argabrite.

11. Conley Plybon worked with the complainant in the Machine Shop for three weeks. During the time that they worked together in the Machine Shop, they worked as laborers, side-by-side, frequently doing the exact same job. A laborer in the Machine Shop was required to sweep, clean, shovel shavings out from the machines and other physical tasks.

12. Mr. Plybon testified that, while he worked in the Machine Shop, the respondent employed at least 30 men in that department and only two women--the complainant and Sharon Wallace.

13. The complainant received her 30 day evaluation on March 28, 1989. The evaluation was not reviewed with the complainant nor was she counseled.

14. Mr. Argabrite evaluated the complainant as marginal in the area of basic work skills. A marginal score is the next to the worst score that can be given. Mr. Argabrite indicated that she received this low score in part because of the manner in which she performed when she was told to pick up slings. The following testimony reveals that the complainant was doing exactly as she was told in regard to picking up slings:

Q. She was doing it with her hands?
A. Yes, sir. She got a hold of them and was pulling on them.
Q. Let me ask you this: Did you, at some point in time, show her or instruct her on what was the proper way to do it, or the easy way to do it?
A. After I watched her do that, yes, sir.
Q. But not before?
A. No, sir.
Q. So she was doing it, basically, the only way she knew how to do it?
A. I could not answer that.
Q. And yet, you turned around and evaluated her poorly for doing it that way; is that right?
A. Yes, sir.
Q. Prior to her doing the job, you never instructed her on an easy or modified, simple way to do it; is that right?
A. That's right.

15. Although Wendell Argabrite testified that he evaluated the complainant poorly because she was hiding from him, he later admitted that the complainant could have been on her break or "personal attention time." He acknowledged that he didn't know if she was and he never asked to find out.

16. Mr. Argabrite further contended that he evaluated the complainant poorly because other employees told him she was hiding from him, yet he was unable to give the name of one such employee.

17. Finally, Mr. Argabrite presented testimony that the complainant would sit down while she was supposed to be working;

however, the co-workers of the complainant specifically refuted this testimony.

18. Mr. Argabrite acknowledged that, while performing his duties at his desk in the Machine Shop, he could not see throughout the shops and frequently couldn't see the employees working. Mr. Argabrite also worked at a second desk which was totally isolated from the work area. Mr. Argabrite testified that he actually supervised the employees working approximately 48 minutes per day.

19. Mr. Plybon testified that he observed the complainant to be a good worker. Mr. Plybon specifically refuted any testimony offered by the respondent that the complainant attempted to hide from management while she was supposed to be working.

20. Mr. Argabrite testified that he did not know what respondent's policy was on how long a probationary employee had to work in his shop before that probationary employee would be evaluated. Yet, he acknowledged that the rule should be applied universally for both males and females. Later, he testified that the evaluation is usually given by the supervisor who supervised the probationary employee the majority of the time in each of the 30, 60 or 90 day evaluation periods.

21. Sharon Wallace, a female, was hired the second time on February 13, 1979, the same day as the complainant. Ms. Wallace, after the orientation week, worked five or six weeks in the Machine Shop. Ms. Wallace testified that while she worked in the Machine Shop, she was never called to the office and she never reviewed an evaluation. The remainder of Ms. Wallace's probationary 90 working day period was spent in the Cold Draw Department.

22. Ms. Wallace presented credible testimony that, during the probationary period of 1989 when she worked with the complainant, she observed the complainant to be a dependable, conscientious and good worker, and she never noticed the complainant attempting to hide or avoid work.

23. It is the respondent's practice that when a job opening becomes available, it is first posted within the department and the regular employees can bid on it. If nobody bids on the job, that job is then posted at the gate and both probationary and regular employees can bid on the job.

24. Probationary employees were allowed to place bids on vacant positions in various departments throughout the respondent's place of business. After working four weeks in the Machine Shop, Conley Plybon bid on and received a job in the Primary Mill Department. Therefore, Mr. Plybon had spent five weeks (one during orientation and four in the Machine Shop) working for the respondent prior to going to work in the Primary Mill Department.

25. The complainant similarly bid on and received a job in the Primary Mill Department on the same day as her male counterpart, Conley Plybon. The complainant, too, had spent five weeks (one during orientation, two weeks in Cold Draw and two weeks in the Machine Shop) working for the respondent.

26. During the complainant's tenure in the Primary Mill, her supervisor was Bob Shaw and her foremen included Vernon Maynard, Reginald Adkins, Bruce Boone and Burt Bartram. The respondent employed between 40 to 60 males, and the complainant was the only female employed in the Primary Mill. The complainant was a laborer

and was assigned to lift large spacers which weighed approximately 68 to 78 pounds. This job was one of the more difficult jobs in that department; however, the complainant was also required to change the milc, a job that some of the full-time male employees could not do.

27. Within the Primary Mill, supervisors had discretion as to what job a probationary employee was required to work. Some jobs were much more difficult than others. One of the more difficult jobs would be lifting an 80 pound metal spacer and placing it under each piece of hot metal that comes off the mill. Another difficult job in the Primary Mill is called "hooking up the milc." The job requires an employee to lift greasy heavy hoses, some of which are six inches in diameter. The job requires an employee to hoist the hoses into the air and connect them to a hook. These greasy hoses have to be lifted, in some cases, as high as six feet off the floor. Although the complainant had difficulty hoisting the hoses, Conley Plybon presented credible evidence that some of the men employed as full-time employees could not do this job. Mr. Plybon's testimony was substantially corroborated by Ronald Holbrook.

28. Mr. Plybon received his 30 day evaluation on March 31, 1989. That meant that at the time of his 30 day evaluation, Mr. Plybon had been in the Primary Mill Department only one week since he had spent five weeks elsewhere, four in Machine Shop and one in orientation.

29. Mr. Plybon was told to report to the office for his evaluation, at which time Reginald Adkins, General Foreman, discussed the evaluation with him. Mr. Plybon was rated marginal in the areas of dependability, basic work skills, quality of work and quantity of

work. During the evaluation, Mr. Adkins explained the areas where Mr. Plybon was deficient and told Mr. Plybon what he needed to do to improve his next evaluation.

30. Mr. Adkins told Mr. Plybon during his 30 day evaluation that if he received two marginal evaluations, he would be terminated. That meant that Mr. Plybon had to upgrade his 60 and 90 evaluation days to "effective" status.

31. Mr. Plybon received his 60 day evaluation on May 13, 1989. The 90 day evaluation of Mr. Plybon was given on June 10, 1989.

32. Mr. Adkins also gave Mr. Plybon his 60 day evaluation. Again, Mr. Adkins thoroughly discussed the factors needed to receive a satisfactory evaluation in order to maintain his employment with respondent.

33. As a direct result of the counseling that Mr. Plybon received during his evaluation reviews with Mr. Adkins, Mr. Plybon was able to elevate his ratings on the evaluations from marginal to effective. This was the determinative factor in allowing Mr. Plybon to retain his job and subsequently become a full-time employee.

34. Ronald Holbrook, a male, was initially hired by the respondent in March or April, 1974. Mr. Holbrook worked for approximately seven years and was laid off in 1981. Mr. Holbrook worked with the complainant when she was employed by the respondent in 1978 through 1980.

35. Mr. Holbrook was hired as a new probationary employee on February 6, 1989, one week prior to the complainant being hired. Mr. Holbrook testified that probationary employees were to receive evaluations every 30 working days. Mr. Holbrook went to work in the

Primary Mill after his orientation. During his tenure in the Primary Mill he worked as a laborer and frequently worked the same jobs as the complainant.

36. Mr. Holbrook presented unrefuted evidence that when the complainant was assigned to one of the more difficult jobs, stacking heavy spacers, she successfully did the work.

37. Mr. Holbrook received his first evaluation in the Primary Mill Department on March 29, 1989, two days prior to the evaluation date of Conley Plybon. For his first evaluation, Mr. Holbrook was called to the Mill office where Mr. Adkins told him what he needed to do to improve. On his 30 day evaluation, Mr. Holbrook was classified as an unsatisfactory worker. However, as a result of counseling sessions and insight provided during the evaluation process, Mr. Holbrook was able to improve his second evaluation of May 4, 1989 and his third evaluation of June 6, 1989, and as a consequence thereof, continued to be employed by the respondent.

38. Vernon L. Maynard was a supervisor in the Primary Mill Department. He has been employed by the respondent for 26 years. As a supervisor, Mr. Maynard's duties included scheduling and employee supervision. Reginald Adkins was Mr. Maynard's supervisor.

39. The complainant's 60 day evaluation was given in the Primary Mill Department on May 11, 1989. Again, the complainant was not counselled and she received a marginal evaluation. Yet, the males who had received marginal evaluations had been counselled and as a result thereof, their evaluations improved to satisfactory.

40. Mr. Maynard testified that the evaluation form of the complainant was filled out by Reginald Adkins. Mr. Maynard testified

that he rated the complainant as "effective" in the area of safety. Mr. Maynard contends that he rated the complainant either marginal or below marginal partly because she could not change the milc. Mr. Maynard also testified that the complainant frequently sat in the Scale House or was on the wrong end of the Ingot Yard.

41. Mr. Maynard did not recall how he rated the complainant on quality of work. However, he recalled that her quality of work was acceptable. Mr. Maynard also indicated that the complainant rated poorly on basic work skills and dependability.

42. Mr. Maynard testified that in July or August, 1989, the Primary Mill Department had five hourly female employees in the department, and that all totaled, there were from 60 to 100 employees in the Primary Mill Department. Of those employees, the respondent employed no females as full-time hourly non-probationary employees.

43. Mr. Plybon testified it was his belief that, whenever a probationary employee worked in two or more departments during a 30 day evaluation period, the probationary employee should have received his evaluations in the department where they spent the most time.

44. During the complainant's probationary period with the respondent, Mr. Plybon frequently asked the complainant whether she had received her evaluation.

45. Larry Oxley and Ronald Holbrook, both males, actively working in the Primary Mill, received evaluations that were reviewed with them and they were counseled so they would improve their performance. The only evaluation complainant received covering her employment in the Primary Mill was her 60 day evaluation. At the time this evaluation was performed and prepared, the complainant had

left the department by voluntary bid out of the Cold Draw. This evaluation was not discussed with the complainant.

46. Thomas Rutherford, a male, received four different evaluations although the respondent contended that probationary employees received only three evaluations, 30, 60 and 90 days.

47. When Mr. Maynard was questioned regarding whether supervisors in the Primary Mill Department reviewed evaluations with probationary male employees, he responded that perhaps some of the other supervisors did, but that he did not, and further, that after the episode involving complainant, that a process started of going through evaluations with employees.

48. Mr. Maynard admitted that a male, Mr. Holbrook, couldn't hook the lines on the mills. Yet, Mr. Holbrook works, even today, for the respondent. Initially, Mr. Adkins testified that all the males could do this job.

49. Mr. Maynard acknowledged that when the complainant was told what to do she did the job well..

50. From January, 1989 through June, 1989, the respondent conducted approximately 130 evaluations. There were 119 males evaluated and 11 females. Vernon Maynard evaluated only one female during this relevant time frame, the complainant. The only male that received an unsatisfactorily evaluation from Mr. Maynard was Mr. Holbrook. Mr. Holbrook was counseled by Mr. Adkins on what he needed to do to improve; the complainant was not treated similarly.

51. Unlike the males who received poor 30 day evaluations, the complainant was never counseled or called to the office to review her deficient areas on the evaluation.

52. Yet, the males who had received marginal evaluations were counselled, and as a result thereof, their evaluations improved to satisfactory. Hence, the males, Ronald Holbrook, Larry Oxley and Conley Plybon were retained as employees, and the complainant lost her job since she had two marginal evaluations.

53. Except for the four weeks, Mr. Plybon worked in the Machine Shop, the remainder of his employment was in the Primary Mill.

54. Paul Gillette, a male, had been continually employed by the respondent since 1967 or 1968. Mr. Gillette was employed in the Primary Mill continually since 1971 and worked in the Primary Mill while the complainant was a probationary employee in 1989. Mr. Gillette did not observe the complainant hiding and not doing her work. Mr. Gillette continued by stating that "she (the complainant) worked better than some of the men." In describing the policy in the Primary Mill with regard to evaluations of probationary employees, Paul Gillette testified it was his understanding that at 30 working day intervals that employees were apprised of their performance evaluations. Mr. Gillette stated that when he worked in the Primary Mill he had only seen males called to the office to review their evaluations with supervisors.

55. Mr. Adkins admitted that he did not mark on the evaluation form of Jack Brewer, a male probationary employee, but he admitted that he had reviewed the form with him. Mr. Adkins testified that he talked to Mr. Brewer because "he did have some problems." Mr. Adkins told Mr. Brewer what he was doing wrong and talked with him about his problem areas.

56. Mr. Adkins testified that he had not reviewed evaluations with several male employees. He also indicated that some of the males had gotten bad 30 or 60 day evaluations.

When questioned specifically about the males which included David Lemon, Larry Collins, James Kirk and George McDowell, Mr. Adkins admitted that they all had received satisfactory 30 day evaluations and would have been retained as employees. Moreover, Mr. Adkins openly admitted that he counseled Conley Plybon and Ronald Holbrook with an eye toward helping these two males improve their low rated evaluations so they would eventually be retained as employees.

57. Significantly, when Mr. Plybon received his 30 day evaluation in the Primary Mill with Mr. Adkins, he received an effective rating in only one of the five categories; yet, he still was considered or graded a satisfactory employee on that evaluation. The marginal category was next to the lowest category and not considered effective. He received four marginal ratings. On the other hand, when the complainant was evaluated in the Primary Mill Department by Mr. Adkins for her 60 day evaluation, she received an effective score on two of the five categories and still was <u>not</u> considered a satisfactory employee.

58. The complainant's 90 day evaluation was conducted on June 7, 1989 in Cold Draw. The complainant received a satisfactory evaluation in Cold Draw. The complainant went to the office in that department and Gary Cooper, her foreman, informed her that she had an excellent evaluation. Since the complainant had not reviewed or been counseled on any prior evaluations, she thought she had successfully

completed her probationary period and thought she would be retained as an employee.

59. Edward Roberts, another key witness called by the respondent, has been employed by the respondent, for 30 years. Mr. Roberts is the operations manager of the Cold Draw Department. As supervisor of Cold Draw, Mr. Roberts' duties include supervisor of hourly work force, maintaining a budget and supervising manufacturing in Cold Draw.

60. Mr. Roberts testified that whenever an employee received an unsatisfactory evaluation, the supervisor would review that evaluation form with the employee. The policy had been in effect since 1988. Mr. Roberts admitted that if an employee received a bad evaluation, that employee should be told that so the employee could improve based on the information relayed in the evaluation process.

61. Mr. Roberts acknowledged that while in Cold Draw the complainant received an effective evaluation and was a satisfactory employee.

62. Mr. Roberts testified that he frequently conferred with hourly employees to get their opinions on how well a probationary employee was performing.

63. There are no female supervisors in the Cold Draw Department. Prior to the influx of new hires in 1988 and 1989, the Cold Draw Department had no women. The last woman to work in that department prior to 1988 was in early 1970's. In August 1989, Cold Draw employed approximately 125 employees, five of which were female.

64. In the Cold Draw Department, no probationary employees received an ineffective 30 or 60 day evaluation from January, 1989 through June, 1989.

65. Terry Johnson worked initially in the Melting Department and received an effective 30 day evaluation. Mr. Johnson also received an effective 60 day evaluation. Terry Johnson received an ineffective 90 day evaluation for not wearing safety equipment and because he made a bed and slept during the night shift. This occurred in the Cold Draw Department. Mr. Johnson was treated differently than the complainant in that he received counseling whereas the complainant was never counselled

66. Lem Waite, a male, received four different evaluations during his 90 day probationary period.

67. Mr. Roberts testified that there was no policy on whether a probationary employee had to work a certain amount of days within the 30 and 60 or 90 day evaluation period before they would receive the evaluation. Conversely, Wendell Argabrite testified that "the evaluation is usually given to the supervisor that supervised them the most during that period of time."

68. Mr. Roberts testified that the decision to terminate the complainant was based on the fact that she would not fit in with the respondent's concept of high-velocity, "especially in our department" (Cold Draw). However, the complainant had received an effective evaluation in all five categories in Cold Draw and was considered a satisfactory employee. This meant that Mr. Roberts had recommended that the complainant be retained as an employee.

69. Following the complainant's termination, the respondent implemented a policy where each employee has to sign the evaluation form.

70. At the time of her discharge, the complainant was earning $7.52 an hour plus an additional 15 cents per hour because she was working the 3:00 p.m. to 11:00 p.m. shift. This is known as an increase in the hourly wage based on shift differential. The complainant's last day of employment was June 14, 1989.

A. Loss Wages from June 14, 1989 through February 12, 1990:

$ 7.525	-	Hourly rate
+ .15	-	Shift differential
$ 7.675	-	Hourly rate
x 8	-	Hours worked per day
$ 61.40	-	Money earned in one day
x 5	-	Days per week
$ 307.00	-	Money earned per week
x 34	-	Total number of weeks from June 14, 1989
$10,438.00		

34 weeks and 3 days worked missed due to discriminatory treatment

$ 61.40	-	Amount earned per day
x 3	-	Days in addition to the 34 weeks
$ 184.20	-	Loss wages for 3 days

$10,438.00	-	Loss wages for 34 weeks
+ 184.20	-	Loss wages for 3 days
$10,622.20	-	Total loss wages from June 14, 1989 through February 12, 1990

B. Loss Wages from Feb.13, 1990 through Feb. 12, 1991:

$ 7.525	-	Base hourly wage
x .10	-	10% pay raise after 1st year
$ .7525	-	Amount of pay raise per hour

$ 7.525	-	Base hour wage
+ .7525	-	After first year pay raise per hour
$ 8.2775	-	Base pay after First Annual raise
+ .15	-	Shift differential
$ 8.4275	-	Hourly rate of pay
x 8	-	Hours worked per day
$ 67.42	-	Money earned on one day

x	5	- Days worked per week
$	337.10	- Wages lost in one week
x	52	- Weeks of work lost in one year
$17,529.20		- Loss wages from Feb. 13, 1990 through Feb. 12, 1991

C. Loss Wages from Feb. 13, 1991 through August 2, 1991

$	7.525	- Base hourly wage
x	.20	- Additional 10% pay raise after 2nd year
$	1.505	- Amount of pay raise per hour

$	7.525	- Base hourly wage
+	1.505	- After 2nd year pay raise per hour
$	9.030	- Base pay after 2nd raise
+	.15	- Shift differential
$	9.180	- Hourly rate of pay
x	8	- Hours worked per day
$	73.44	- Wages Loss in one day
x	5	- Days worked per week
$	367.20	- Wages loss per week
x	24	- 24 weeks and 2 days lost from Feb. 13, 1991 through Aug. 2, 1991
$ 8,812.80		- 24 weeks of loss wages

$	73.44	- Loss wages per day
x	2	- 2 days loss
$	146.88	- Wages loss in 2 days

$ 8,812.80		- 24 weeks of loss wages from Feb. 13-Aug. 2, 1991
+	146.88	- 2 days additions loss wages
$ 8,959.68		- Total loss wages from Feb. 13, 1991 through Aug. 2, 1991

D.	$10,622.20	- Loss wages from June 14, 1989-Feb. 12, 1990
	$17,529.20	- Loss wages from Feb. 13, 1990-Feb. 12, 1990
	$ 8,959.68	- Loss wages from Feb. 13, 1991-Aug. 2, 1991
	$37,111.08	- Total Loss Wages through Aug. 2, 1991

E. In addition to the loss wage outlined hereinabove, the complainant will continue to suffer loss wages at the rate of $73.44 per day for 5 days a week until she is reinstated to her former position.

F. The complainant is entitled to $700.00 in Christmas Bonuses: $200.00 for 1989 and $500.00 for the year 1990. There are benefits she lost as a result of the illegal discrimination she suffered.

71. The complainant is entitled to her job back.

72. After the complainant was terminated, the complainant requested applications from other employers such as Novemont, Adells, Harrison Wholesale and National Rubber Plant in Kenova, West Virginia. She was denied an application because these employers were not hiring.

73. The complainant received $5,865.00 in public assistance from the State of Ohio following her termination by respondent through August 1991. This entitlement nor any future payments should be deducted from the complainant's monies based on the collatural source rules, and in furtherance of an independent social policy which should not inure to the benefit of the respondent.

74. Complainant is entitled to reasonable attorney fees.

75. The complainant's attorney reasonably expended 145.3 hours in litigation of this matter, as set forth in his itemized fee affidavit.

76. An hourly rate of $95.00 is reasonable for the legal services rendered by complainant's attorney, as supported by the fee affidavit.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9 and 10, Article 11, Chapter 5 of the West Virginia Code.

2. At all times referred to herein, the respondent, INCO Alloys International, Inc., is an "employer" as that term is defined by the West Virginia Human Rights Act, (WV Code §5-11-3(d).).

3. At all times referred to herein, the complainant, Linda L. Taylor, is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the Code of West Virginia.

4. On or about July 26, 1989, Linda L. Taylor, a female filed a verified complaint properly alleging that the respondent had engaged in one or more unlawful discriminatory practices within the meaning of Section 9, Article 11, Chapter 5 of the Code of West Virginia.

5. The complainant alleges, among other things, that on or about July 15, 1989, she was terminated from her position of laborer and treated differently than the males employee by INCO Alloys International, Inc.

6. The complainant further alleges that she received disparate treatment while she worked as a laborer due to her sex.

7. The West Virginia Human Rights Commission found that there was probable cause to believe that the respondent had discriminated against the complainant on the basis of her sex in the terms, conditions and privileges of her employment.

8. A complaint alleging discriminatory employment practices encompasses a charge of continuing discrimination, including discharge, if the discharge was a result of discrimination in the terms, conditions and privileges of employment

9. In cases alleging a discriminatory discharge from employment, the time period for filing a complaint with the Human Rights Commission ordinarily begins to run on the date when the employer unequivocally notifies the employee of the termination

decision. Independent Fire Co. No. 1 v. WV Human Rights Commission, supra; Naylor v. WV Human Rights Commission, supra.

10. In the present case, the respondent terminated the complainant on or about June 15, 1989. The complaint in this case was timely filed.

11. As in all cases, the complainant bears the burden of proving by a preponderance of the evidence that the respondent discriminated against her in the terms, conditions and privileges of her employment.

The question presented is whether the complainant, Linda L. Taylor, presented sufficient evidence to establish a prima facie case of disparate treatment based on her sex. In a discharge case, a complainant may meet the initial burden of proving a prima facie case brought under the West Virginia Human Rights Act, et seq., by proving the following elements:

(1) That the complainant is a member of a protected class;

(2) That the complainant was discharged, or forced to resign, from employment; and

(3) That a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct. State v. Logan-Mingo Area Mental Health Agency, 329 S.E.2d 77 (WV 1985). See also Burdette v. FMC Corp., 566 F. Supp. 808 (S.D. WV 1983).

12. Clearly, the complainant in this case has presented sufficient evidence to establish a prima facie case of sex discrimination in that she has raised an inference of illegal

discrimination. First, the complainant is a member of a protected class in that she is a female. She suffered an adverse employment decision when she was terminated on or about June 15, 1989 by the respondent. Finally, the complainant presented credible evidence that at least three males, Conley Plybon, Larry Oxley and Ronald Holbrook, who had received poor thirty day evaluations were treated differently in the following ways:

(1) The males were taken to the office and had their evaluations reviewed with them;

(2) The males were told the areas where they were deficient;

(3) The males were also told what they should do to improve their evaluations.

13. The complainant has presented sufficient evidence to prove a prima facie case of disparate treatment thereby shifting the burden to the respondent to articulate a legitimate nondiscriminatory reason for its actions. The respondent denies that the complainant received disparate treatment while she was employed as a laborer. The respondent asserts that the complainant was discharged for poor work performance. As proof thereof, it points to poor evaluations the complainant received in the Machine Shop and Primary Mill because she shirked her job duties and took extended breaks. The respondent also asserts that she was not suitable for high velocity production where employees need to be interchangeable. Moreover, the respondent suggests that the complainant's supervisor could not or did not review her evaluation with her because she had transferred to another department.

14. The disparate treatment the complainant received was no more than a pretext to discriminate against her. In these cases, the hearing examiner must access the credibility of the witnesses and "decide which party's explanation of the employer's motivation it believes." U.S. Postal Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). Moreover, in Burdine, supra, the United States Supreme Court explains how a pretext may be established.

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer of indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S. at 804-805, 36 L.Ed.2d 668, 93 S.Ct. 1817. [Emphasis Supplied]

15. The complainant presented credible witnesses who testified that she was a "good worker" and was observed to have worked right beside them. In support of its assertion that the complainant could note accomplish interchangeable job duties, the respondent points to the fact that the complainant could not hook the hoses. Yet, the respondent's own witness, Vernon Maynard, testified that Ronald Holbrook, a male could not do this same job. Finally, different departments appeared to have adopted different policies on whether to review the evaluation with the probationary employee. This hearing examiner finds that the Primary Mill Department frequently counseled the males who were having difficulty and failed to offer the complainant, a female, the same assistance. As articulated by Conley Plybon, the complainant was in that department while the males were being called up for review.

16. Judicial precedent has established that pretext can be established when evidence is presented which suggests that a supervisor manipulated the employee and their work assignment and thereby caused poor work performance. Taylor v. Safeway Stores, Inc., 365 F. Supp 468 (D.Colo. 1973). In Taylor, the court states:

> The defendant contends that Taylor was terminated within his probationary period for failure to meet required production standards. The records contain the production records supporting this contention. They show on their face that Taylor's production averages were substandard, to say the least. We hold that the defendant has thus overcome the force of the plaintiff's prima facie case and that it has discharged its burden to go forward at this stage.
> ***
> But, as McDonell-Douglas teaches, the inquiry does not end here. The burden of going forward now shifts back to the plaintiff. At this point, however, the only issue remaining before the court is whether the reasons advanced by the defendant, i.e. poor work performance, was merely a pretext for a course of conduct prohibited by Title VII. (Id at 473).

In continuing, the court notes that where the supervisor has the disposition to discriminate and can manipulate work assignment to cause poor work performance, then his actions are a pretext to illegal discrimination.

> It seems that by selective order assignments, Walker could manipulate, or at least influence, production averages. That he had the opportunity and disposition to use this power so as to discriminate against Taylor is apparent from the evidence.
> ***
> In light of all the evidence and our judgments concerning the credibility of the witnesses, we are compelled to resolve this question in favor of the plaintiff. We find that Walker did retain sufficient control over order

> assignments to influence the production average of his men. (Id. at 473).

Finally, this court noted the manipulation need not have its specific design to discriminate.

> In order to find that Taylor's unsatisfactory production record was merely pretextual, this court need not find that Walker's practices of selective order assignments had as its specific design to discriminate against Taylor.

17. The recent case of Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990) is germane to the case at bar. In Vaughn, Texaco underwent a study to save costs. In describing the facts, the court states:

> In 1985-86, Texaco undertook a study to identify activities it could eliminate to save costs. To meet the cost-reduction goal set by that study, the Land department fired its two "poorest performers," one of whom was Vaughn, as the "lowest ranked" contact analyst; the other was a white male.

Vaughn was a black female attorney employed by Texaco as a contract analyst. At one time during her employment, she was the "highest ranked contract analyst" in the department. Texaco argued that Vaughn had failed to meet their goals. In response, Vaughn presented evidence that her supervisor's failure to criticize or counsel her was based on discrimination. The case was initially argued before a federal magistrate who ruled in favor of Texaco. The Fifth Circuit Court of Appeals reversed that decision. the Court notes:

> In focusing only on the final act of firing and in disregarding Texaco's discrimination in not counseling or criticizing Vaughn, the magistrate committed clear error.

In explaining its rationale the court continues:

> Although Vaughn's race may not have directly motivated the 1987 decision to fire her, race did

> play a part, as the magistrate found, in Vaughn's employment relationship with Texaco from 1985 to 1987. Texaco's treatment of Vaughn was not color-blind during that period. In neither criticizing Vaughn when her work was unsatisfactory nor counselling her how to improve, Texaco treated Vaughn differently than it did its other contract analysts because, as the magistrate found, she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees. One of those employees was placed on an improvement program. As for the others, Texaco does not deny that they received, at least, informal counselling. The evidence indicates that Vaughn had the ability to improve. As Texaco acknowledges, she was once its "highest ranked contract analyst."
> ***
> Because Texaco's behavior was race-motivated, Texaco has violated Title VII. Texaco limited or classified Vaughn in a way which would either "tend to deprive [her] of employment opportunities or otherwise adversely affect [her] status as an employee." 42 U.S.C. 2000e-2(a)(2). Texaco has also "otherwise" discriminated against Vaughn with respect to her "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1).

18. In the present case, the complainant's supervisors would give her a difficult job (i.e., truck followers job) without instructing her and then evaluate her poorly for doing the job the only way she knew how. Moreover, the respondent failed to counsel or criticize the complainant in any way.

19. The next question presented is whether the complainant failed to mitigate her damages when she presented unrefuted evidence that she actively sought employment with at least three different employers but they were not accepting applications.

> Once a claimant establishes a prima facie case of discrimination and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the

> defendant. The defendant may satisfy his burden only if he established that: (1) they were substantially equivalent positions which were available; and (2) the claimant failed to use reasonable care and diligence in seeking such positions. Paxton v. Crabtree __WV__, 400 S.E.2d 245 (1990); Holbrook v. Poole Associates, Inc., 400 S.E.2d 863 (WV 1990).

In the present case, the complainant attempted to apply for employment at least three different times. The respondent put on no evidence that equivalent positions were available.

The complainant in the case at bar did not sit back and allow damages to accrue. She actively sought employment and was simply unable to find it. It is significant that in Holbrook, supra, the supreme court ruled, "We do not believe that the appellee met its burden of proving that the appellant failed to mitigate her damages." Id at 869. Hence, the only logical conclusion is that that complainant attempted to mitigate her damages by looking for work but simply was not hired.

Moreover, in Paxton, supra, the West Virginia Supreme Court discusses the role of the wrongfully discharged employee.

> The Administrative Director's argument is flawed because it fails to recognize that the employer has the burden of proving that the employee failed to mitigate damages. We referred to the employer's burden in both Syllabus Point 2 of Mason County Board of Education, and in the discussing the text:
>
> The authorities have pointed out that "duty" in this context is an inaccurate mode of expression. 11 S. Williston, Contracts 1359 (3d Ed. 1968); 5 A.Corbin, Contracts 1095 (1965). The employee is in fact under no affirmative 'duty' to seek employment; he may seek it or not, at his pleasure. However, should employment similar to that contemplated by his breached contract be locally available to him, he will be charged, in mitigation of his damages, the amount of the salary he would have earned at that employment.... [Emphasis Added]

******

"While mitigation of damages is an affirmative defense that must be proved by the party that has breached the contract, nonetheless, the wrongfully discharged employee who has not secured employment must be prepared to demonstrate that he or she did not make a voluntary decision not to work, but rather used reasonable and diligent efforts to secure acceptable employment." ___WV___at___, 295 S.E.2d at 724-26.

To reiterate, the complainant sought employment but was unable to find it.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. The complainant shall be reinstated to her position as laborer.

3. Within 31 days receipt of this decision, the respondent shall pay to the complainant retroactive seniority running from July 15, 1989 as a laborer with full benefits therefrom to be paid as if she had never been terminated.

4. Within 31 days of receipt of this decision, the respondent shall pay to the complainant $37,111.08 as outlined in Finding of Fact Number 70, and all other monies due as set forth therein.

5. Within 31 days of receipt of this decision, the respondent shall pay to the complainant attorney fees and costs in the amount

of $13,803.50 as per the attached affidavit of itemized fees and costs.

6. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,500.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

7. The respondent shall pay ten percent per annum interest on all monetary relief.

It is so **ORDERED**.

Entered this 7th day of April, 1992.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER