COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR
Governor

June 27, 1986

Richard L. Trammel
401 Main Avenue
Logan, WV 25601

Thomas T. Lawson
Woods, Rogers & Hazlegrove
P. O. Box 720
Roanoke, VA 24004

Mr. Joseph M. Price
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P. O. Box 1791
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Mr. Jeffrey Van Gelder
Assistant Attorney General
State Capitol/Rm WW-43S
Charleston, WV 25305

RE: Richard L. Trammell V Appalachian Power Co./EA-196-84

Dear Mr. Trammell, Mr. Lawson, Mr. Price and Mr. Van Gelder:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Richard L. Tramwell V Appalachian Power Company/EA-196-84.

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

RICHARD L. TRAMMELL,

Complainant,

vs. Docket No. EA-196-84

APPALACHIAN POWER COMPANY,

Respondent.

O R D E R

On the 11th day of June, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner James Gerl. After consideration of the aforementioned, the Commission does hereby adopts the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby amends the recommended decision of the Hearing Examiner in the section entitled "Proposed Order" at page 10 by deleting paragraph 2 of said section and substituting therefor the following paragraph.

"2. Respondent shall, when the first vacancy occurs for an area service restorer, offer said position to the complainant. In addition the respondent shall pay the complainant the regular salary for that position until such time as the offer of employment is made."

The Commission further amends the recommended decision by adding to paragraph 3 of the Proposed Order, at page 10, the following phrase "with prejudgment interest at the rate of 10%

per annum from July 5, 1983, until February 19, 1986, the date of the hearing in this matter."

The Commission further amends the recommended decision in paragraph 5 of the Proposed Order, at page 10, by deleting therefrom the figure "60" and substituting therefor the figure "35."

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 as amended by this Order.

The respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thrity-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

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 27 day of June, 1986.

Respectfully Submitted,

Betty A. Hamilton

CHAIR/VICE-CHAIR,
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

Richard L. Trammell, Complainant	)	
v.	)	Case No. EA-196-84
Appalachian Power Company, Respondent	)	

EXCEPTIONS OF APPALACHIAN POWER COMPANY TO THE HEARING EXAMINER'S PROPOSED ORDER AND DECISION

Appalachian Power Company ("Appalachian") files exceptions to the hearing examiner's proposed order and decision as follows:

I. THE HEARING EXAMINER ERRED IN FAILING TO APPLY THE PROPER PROOF SCHEME TO THE FACTS BEFORE HIM.

The hearing examiner analyzed the evidence presented at the hearing utilizing the three-tiered system of proof set out in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The McDonnell-Douglas proof scheme is a tool intended to provide judges a method of assigning the burdens of production and persuasion in a discrimination case. Loeb v. Textron Inc., 600 F.2d 1003, 1016 (1st Cir. 1979). Because all the evidence of record, including Appalachian's articulated reasons for its decision, were presented during complainant's case in chief, the application of the McDonnell-Douglas model was unneccessary. Regardless of the means by which it was assigned, under the circumstances complainant bore the ultimate burden of proving that Appalachian discriminated against him on the basis of his

age. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

A. Appalachian Articulated a Legitimate Nondiscriminatory Reason For Its Employment Decision.

Under his McDonnell-Douglas analysis, the hearing examiner determined that complainant established a prima facie case of age discrimination against Appalachian. (Proposed Order at 6). The hearing examiner also concluded that Appalachian had articulated a legitimate, non-discriminatory reason for its decision not to hire complainant to the position of area service restorer. (Proposed Order at 7). The examiner, however, disbelieved Appalachian's stated reasons on the grounds that they were pretextual. (Proposed Order at 7). Such a finding conflicts with both established principles of law and the evidence presented in this case.

1. The Reason Attributed to Appalachian by the Hearing Examiner is Incorrect.

At the outset, it is imperative that the most glaring of the hearing examiner's errors be corrected. The examiner erroneously characterized Appalachian's reason for not hiring complainant as being that complainant "was more likely to stay in the Gilbert area because he was more 'dependable' and 'steady.'" The uncontradicted evidence was that Appalachian had a historical difficulty in staffing the restorer position in the Gilbert, West Virginia area. (Tr. pp. 75-76, 115, 123, 125). No less than four individuals held that job between 1977 and 1983. (Tr. pp.

75-76). That particular position required the employee to transfer to Gilbert, a remote area, and qualified personnel repeatedly refused the job rather than move to that part of the state. (Tr. p. 126). Particular difficulty was experienced with residents of Logan, the home of the complainant, because of their recurring preference for Logan over the Gilbert area. (Tr. pp. 75-76, 123, 125).

The consistent and unrebutted testimony of Appalachian officials was that their first priority was to hire an individual that would be willing to live in Gilbert. (Tr. p. 108). During his previous employment with Appalachian, complainant had demonstrated his preference to remain in Logan rather than accept transfer to a job in the Gilbert area. (Tr. pp. 113-114, 129, 173). Accordingly, Appalachian feared that the complainant would only take the job to gain employment with the company and then transfer back to Logan at the first opportunity. (Tr. pp. 114-15). Thus the existing problem with the Gilbert job would continue.

Dalton, the individual hired for the Gilbert position, had no such history and, in fact, had shown a willingness to accept the transfer to Gilbert. (Tr. pp. 96, 121-122, 166-167). It was this factor, proven through the unchallenged testimony of multiple witnesses, that motivated Appalachian's decision in favor of Dalton. The other characteristics cited by the examiner, such as stability and dependability, unquestionably

weighed in Dalton's favor. But to say that those characteristics represented Appalachian's primary reason for hiring Dalton simply conflicts with the evidence and ignores the plain facts proven at the hearing.

B. Complainant Produced No Probative Evidence That Appalachian's Stated Rationale Was Pretextual.

Once an employer advances a legitimate explanation for its treatment of a complainant, as Appalachian did in this case by introducing evidence of Trammell's previous job decision, "the presumption or inference arising from proof of a prima facie case dissolves in an [age] case." Nelson v. Green Ford, Inc., No. 85-1516 slip op. (4th Cir. April 8, 1986), Fink v. Western Electric Co., 708 F.2d 909, 915 (4th Cir. 1983) (federal age cases). As such, it became incumbent upon complainant to prove that Appalachian's explanation was pretextual. In order to prevail, his evidence must show that but for his age, complainant would have been hired. Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 240 (4th Cir. 1982). Age must be proven to have been a "determining factor" in Appalachain's decision. Id.; Carter v. Maloney Trucking & Storage, Inc., 631 F.2d 40, 42-43 (4th Cir. 1980).

The hearing examiner's proposed order and decision contains no finding that age was a determining factor or that complainant would have been hired but for his age. No evidence was cited which would indicate that age played any part in Appalachian's

decision nor was any such evidence presented. In an effort to justify his legal conclusion that Appalachian "discriminated against complainant on the basis of his age," the hearing examiner referred to certain matters which he judged to be evidence of pretext. Quite simply, his conclusions are without evidence in the record to support them.

When a complainant has the burden of proving that an employer's stated reasons for a decision are pretextual, his rebuttal evidence must address those reasons. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1414 (7th Cir. 1984). The only testimony which remotely addressed Appalachian's stated rationale was complainant's own testimony that he was willing to move to Gilbert in 1983, an act which would have been contrary to his previously demonstrated inclinations. The hearing examiner relied heavily on these conclusory statements. (Proposed Order at 8). Such testimony is irrelevant as a matter of law. The Fourth Circuit has stated:

> Plaintiff's opinion of himself . . . is not relevant. It is the perception of the decision-maker which is relevant.

Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980) (emphasis added). See also Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 564 (5th Cir. 1983) cert. denied 104 S. Ct. 2658 (1984). (employee's own testimony regarding his subjective belief is insufficient).

The only beliefs and opinions relevant to this issue therefore are those of Appalachian, the decision-maker, and the

uncontroverted evidence was that the company believed that complainant was not likely to remain in Gilbert as it desired. Complainant's self-serving statements are immaterial to the issue at hand and can provide no basis for the hearing examiner's conclusions.

C. The Hearing Examiner Judged Appalachian's Conduct By Inappropriate Legal Standards.

In grasping at the straws which he labeled evidence of pretext, the hearing examiner blamed Appalachian for not investigating complainant's reasons for refusing to move to the Gilbert area. (Proposed Order at 8). The law imposes no such duty upon employers and there is no liability for failing to ask the "right" question of job applicants. See Olsen v. Southern Pacific Transportation Co., 480 F.Supp. 773, 781 (W.D. Cal. 1979); Fink v. Western Electric Co., 708 F.2d at 915 (employer's have no affirmative duty to afford special treatment to protected class). The hearing examiner's requirement that Appalachian act affirmatively to "cure" an applicant's proven shortcomings is both unfair and wrong as a matter of law.

It is evident from the proposed order that the hearing examiner sought to impose his own personal standard of business practice upon Appalachian. The courts, however, uniformly refrain from such second-guessing of employers' decisions. In Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), the First Circuit described the well-reasoned standard:

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was pretext for illegal discrimination. The employer's stated reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act on or approve. Nor is an employer required to adopt a policy that will maximize the number of . . . older persons in his work force. An employer is entitled to make his own policy and business judgments . . . .

600 F.2d at 1012. See also Douglas v. Anderson, 656 F.2d 528, 534 (9th Cir. 1981) (court need not approve of employer's business decisions). Moreover, there is no requirement that an employer be correct; it is entitled to misjudge applicants for a particular job so long as its choice is not based on impermissible criteria. Texas Department of Community Affairs v. Burdine, 450 U.S. at 258-59; EEOC v. Trans World Airlines, 544 F.Supp 1187, 1220, 1224 (S.D. NY 1982).

It follows that Appalachian was entitled to set its own criteria for the job of area service restorer. Foremost of the company's goals was to hire an individual who the company believed would be willing to live in the Gilbert area. (Tr. p. 108). It has never been contended that such a requirement was impermissible. Regardless of how the hearing examiner perceived the value of Appalachian's goal or the accuracy of its judgment, the company is entitled, as a matter of right, to exercise its judgment in the manner it did.

D. The Hearing Examiner's Findings Regarding Appalachian's Alleged Pretext For Discrimination Are Not Supported By Probative Evidence.

1. The Hearing Examiner Misrepresented the Relevant Facts.

In an effort to justify his threadbare legal conclusions, the hearing examiner referred to other items in the record which he touted as further evidence of pretext. A review of the probative evidence further illustrates the examiner's misrepresentation of the facts and the complete absence of any proof to support his findings.

First, the examiner cited the fact that complainant had been employed by Appalachian for a longer period than Dalton. (Proposed Order at 8). Although the hearing examiner stated that this somehow "impaired" Appalachian's case, he did not provide any explanation or basis for this opinion. The central issue at the hearing was Appalachian's belief that Dalton was the most likely applicant to remain in Gilbert - not the length of the applicant's previous service. In view of this, the relevance of complainant's and Dalton's previous tenures of employment can be only a matter for speculation. Accordingly, those facts constitute no support to the finding of pretext.

The examiner also stated that complainant's experience was "far superior" to that of Dalton. (Proposed Order at 8). Again, the examiner disregarded the uncontroverted evidence from the hearing. Complainant most certainly possessed great experience, but the record shows that Dalton was a journeyman lineman who

likewise possessed the great experience in and the qualifications necessary to the work in question. (Tr. pp. 99, 178-79).

The evidence showed that Dalton had been employed for several years by R. H. Bouligny, a line contractor. As a line contractor, R. H. Bouligny was hired by Appalachian to build the company's transmission lines. As a lineman for Bouligny, Dalton was involved in all aspects of service work; building transformers, running wires from poles to houses, turnkey work, meter work and trouble-shooting. Furthermore, Dalton's experience with Appalachian's primary and secondary lines provided him with the essential skills to do the work of an area service restorer. (Tr. pp. 99-100, 178-79). The examiner flatly ignored these facts and such an omission must flaw his conclusions accordingly.

The examiner also misrepresented that Dalton had received a written reprimand during his previous employment with Appalachian (Proposed Order at 5, 8). That finding is simply contrary to the facts.

The incident in question concerned Dalton's missing work because of a medical emergency involving his wife. (Tr. p. 52). The incident was noted in Dalton's file because he was a new employee still within his probationary period. (Tr. pp. 52-54). No written notice was issued to him. The testimony was quite clear that the matter was <u>not</u> a disciplinary action. (Tr. p. 54). Further, that evidence is consistent with the language in Appalachian's employee handbook, an exhibit in this case, which

specifies that oral warnings by a supervisor are matters of information and training and are not considered disciplinary actions. (Employee Handbook at p. 26). The hearing examiner's statement that the above incident constituted a written reprimand is blatant error and demonstrative of the cavalier treatment given to the facts established at the hearing.

In yet another instance, the hearing examiner discounted the significance of an episode in which complainant verbally attacked a supervisor. The evidence, unrebutted by complainant, was that complainant cursed at Harry E. Ruloff and challenged him to fight in the presence of other employees. (Tr. pp. 112-13). Mr. Ruloff was the individual who made the final hiring decision with respect to the restorer position at issue here. (Tr. p. 148).

The hearing examiner dismissed the effect of complainant's egregious behavior because it took place during a strike and no discipline resulted. As the examiner himself observed, episodes in a strike context may be treated differently. That can account for the lack of disciplinary action in this case. Mr. Ruloff, however, testified that complainant's quick temper was among the reasons why complainant was not hired. (Tr. p. 112). It would be absurd to believe that such an experience would not have a real effect upon Mr. Ruloff's consideration of complainant for a job opening. Far from being evidence of pretext, this evidence provides additional support for Appalachian's decision. See

Olsen v. Southern Pacific Transportation Co., 480 F.Supp. 773, 780 (N.D. Ca. 1979) (decision made on basis of resentment or anger not improper).

2. The Hearing Examiner Consciously Ignored the Probative Evidence on the Issue of Pretext.

The proposed order and decision is highly suspect, not only for the inaccuracies and errors which it contains, but for its telling omissions as well. The hearing examiner inexplicably excluded many salient facts which more than adequately rebut his conclusions on the pretext issue.

Much of the examiner's opinion was based on a selective comparison of complainant and Dalton. Conveniently absent from his findings is the very basic fact that both complainant and Dalton were qualified for the job based on their knowledge and experience. Also absent was any mention of the respective performance reviews of the two individuals. Dalton had received outstanding reviews for his work while complainant, in seventeen years of service, had never received more than a satisfactory evaluation. (Tr. pp. 146-47, 262). Additionally, had complainant been hired, he would still have required additional training in order to perform the job. (Tr. pp. 181, 186).

In any event, such a comparison is not relevant to the reasons for Appalachian's decision and therefore not relevant on the issue of pretext. Quite relevant, however, was the evidence that the third qualified applicant for the restorer position was

not chosen for the same reason as complainant. Appalachian officials believed that the individual would remain in Gilbert for only a brief period and then return to his home in Tennessee. (Tr. pp. 134-35, 143-44). It was also proven that Appalachian had made past decisions based on individuals' lack of long-term commitment to a particular job or locale. (Tr. pp. 134-35). The evidence of Appalachian's consistent application of its hiring policy, both in this instance and others, cuts at the very core of the examiner's findings of pretext and necessitates that the Commission reject them in their entirety.

E. Appalachian's Use of Subjective Criteria Was Permissible Under the Circumstances.

The hearing examiner discussed at some length the subjective nature of Appalachian's decision. The examiner correctly observed that the use of subjective criteria is not improper but promptly reversed himself and flatly prohibited its use by Appalachian. (Proposed Order at 9). His misapprehension of the correct legal standard again renders his conclusions unworthy of consideration.

Appalachian determined that complainant was unlikely to remain in Gilbert. It based its decision on an objective fact - complainant had previously refused a job in the same area in order to remain in Logan. Unquestionably certain subjective factors were considered in the decision to hire Dalton but that practice is not automatically prohibited. The only other "objective" facts available for consideration were the statements

of the applicants themselves expressing a willingness to move. As both the evidence and common sense dictate, anyone wanting the job would make similar statements. (Tr. p. 135). There simply were no other means by which to accurately judge the intentions of the parties. There was, by necessity, some degree of subjectivity in the type of evaluations Appalachian was required to make.

Given the absence of any recognized quantifying measure of a job applicant's intent to remain in Gilbert, Appalachian's system of evaluation based upon interviews and recommendations by senior supervisors must constitute a permissible means for determining which of the three qualified candidates would best meet the company's goals. See EEOC v. Franklin Square School District, 24 FEP 594, 606 (F.D. NY 1980) (subjective evaluations acceptable if no objective means available). Although certain subjective evaluations were necessary, any danger of prejudice based on age was eliminated by the method used including the interview and recommendation by two senior supervisors and the approval and review by two more ranking personnel. (Tr. pp. 40-41, 84-86). The fact that the primary decision maker, Harry Ruloff, and others were themselves within the protected age class also mitigated any possible prejudice to complainant. (Tr. pp. 102-03). Consequently, Appalachian's unavoidable use of subjective criteria in this case was both reasonable and permissible. The hearing examiner's finding to the opposite is contrary to the law and without any basis in fact.

F. The Hearing Examiner Improperly Shifted the Burden of Proof Upon Appalachian.

The record adequately demonstrates that complainant presented no probative evidence to rebut or challenge Appalachian's stated rationale for its hiring decision. Nonetheless, the hearing examiner rejected Appalachian's reasons. As previously demonstrated, he had no legitimate basis in the evidence upon which to rest his conclusions. By excusing complainant from his requirement to present some scintilla of evidence that Appalachian discriminated against him because of his age, the examiner in effect shifted the burden to Appalachian to affirmatively prove its case.

Such a requirement is impermissible and violative of the most basic principles of discrimination law. It is well established that a defendant in a discrimination case has only a burden of production. The ultimate burden of proof always rests with the complainant and his failure to present that proof dooms his claim. Texas Department of Community Affairs v. Burdine. 450 U.S. at 254. Because complainant presented absolutely no evidence of discrimination, he failed to meet his burden of proof and cannot prevail. The Commission should disregard the proposed order and decision as being inconsistent with both fact and law.

II. THE HEARING EXAMINER DEMONSTRATED BIAS AGAINST APPALACHIAN WHICH MUST DISQUALIFY HIS DECISION.

Based upon the foregoing discussion, the regrettable but inescapable conclusion is that the hearing examiner operated from

such a biased position that his decision should be rejected in toto. In addition to the previously cited misrepresentation of fact and misapplication of law, other indications of the examiner's bias are readily apparent.

In the proposed order and decision, the examiner discredits the testimony of "respondent's witnesses" when the record plainly shows that complainant called every witness. (Proposed Order at 7). Further, the examiner rejected as incredible all the evidence which conflicted with his findings, even that which was fully supported by testimony and unrebutted. (Proposed Order at 1-2). Among the evidence so summarily dismissed was the proof of Dalton's qualifications, proof that complainant's previous job decision was the primary motivation for Appalachian's decision, and Appalachian's consistent application of its policy to other individuals, etc. Each fact was established without issue and neatly rebuts the examiner's findings. Yet each fact was rejected without basis or explanation.

The examiner's inexcusable misrepresentation of the witnesses' status along with his callous disregard for the salient facts and impermissible shift of the burden of proof underscore the bias and prejudicial stance assumed by him during the course of this litigation. The only remedy for this conduct can be the absolute rejection of the proposed order and decision and the substitution of a finding in Appalachian's favor.

III. THE RECOMMENDED RELIEF IS UNAVAILABLE AS A MATTER OF LAW

As a final matter, Appalachian takes exception to the proposed relief ordering the company to hire complainant as an area service restorer. Appalachian cannot be required to bump another individual from a job nor create a position to accommodate complainant. Any order involving the mandatory employment of complainant must specify that such employment applies only to the next available vacancy. See Spagnulo v. Whirlpool Corp., 717 F.2d 114, 117-121 (4th Cir. 1983). The examiner's recommended relief is therefor unavailable at law.

CONCLUSION

Based upon the foregoing arguments and authorities, Appalachian respectfully requests the Commission to disregard the hearing examiner's proposed order and decision as being unsupported by fact and contrary to law. Appalachian further requests that the Commission substitute a more appropriate decision consistent with the evidence of the case and the appropriate legal standards.

Respectfully submitted

APPALACHIAN POWER COMPANY

By _____
Of Counsel

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

RICHARD L. TRAMMELL

Complainant,

V. DOCKET NO. EA-196-84

APPALACHIAN POWER COMPANY,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on February 19, 1986 in Logan, West Virginia. The complaint was filed on September 23, 1983. The notice of hearing was filed on November 18, 1985. Respondent filed an answer on December 3, 1985. A telephone Status Conference was convened on December 13, 1985. Subsequent to the hearing both parties submitted written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings, and conclusions have been omitted as not relevant or not necessary to a proper determination of the material

issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his age by failing to hire him in the position of area service restorer. Respondent maintains that it hired the applicant most likely to reside in the Man, West Virginia area.

FINDINGS OF FACT

Based upon the parties' stipulations of uncontested fact as get forth in the joint pre-hearing memorandum filed by the parties herein, the Hearing Examiner has made the following findings of fact:

1. Complainant was born on October 10, 1937.

2. Complainant was employed by respondent from May 29, 1957, until March 3, 1975.

3. Complainant held the following positions with respondent during the following periods.

Groundman	5/29/57	to	9/30/57
Station Man Helper	9/30/57	to	8/19/59
	10/13/59	to	12/9/60
	5/22/61	to	11/7/61
Station Man C	12/9/60	to	5/22/61
	9/29/62	to	5/13/63
Meter Serviceman C	11/7/61	to	9/29/62
Station Man B	5/13/63	to	3/4/67
Station Man A	3/4/67	to	6/2/73
Meter Serviceman A	6/2/73	to	3/3/75

4. There was a job opening for the position of area service restorer with respondent in the Gilbert, West Virginia area in 1983.

5. The area service restorer position in the Gilbert area was posted on or about February 15, 1983, and April 28, 1983, on the bulletin boards of the Logan Service Building, and on respondent's buildings in Madison and Man, West Virginia.

6. Complainant applied for the position of area service restorer in the Gilbert area on May 6, 1983.

7. Complainant was interviewed by respondent for the position of area service restorer on June 7, 1983. Complainant was interviewed by Watson and Garrett of the T&D Department.

8. By letter dated July 5, 1983, from Donevant, Personnel Supervisor in respondent's Logan office, complainant was rejected for the position of area service restorer with respondent.

9. Complainant was forty-five (45) years of age when he applied for the position of area service restorer with respondent in 1983.

10. Respondent hired Dalton on July 5, 1983, to fill the position of area service restorer in the Gilbert, West Virginia, area.

11. Dalton, born May 7, 1956, was twenty-seven (27) years old when he was hired as an area service restorer by the respondent.

12. Dalton applied for employment as area service restorer with the respondent on April 29, 1983.

13. Dalton started out at $11.865 per hour on July 5, 1983, as an area service restorer. On January 1, 1984, the rate was increased to $12.46 per hour for this position. On April 11, 1984, the rate was again increased to $13.085 per hour.

14. For the period beginning July 2, 1983, and ending December 16, 1983, Dalton worked 179.7 hours of overtime and received $3,402.88 in overtime compensation.

15. For the period beginning December 17, 1983, and ending December 14, 1984, Dalton worked 292.9 hours of overtime and received $5,916.43 in overtime compensation.

16. For the period beginning December 15, 1984, and ending December 13, 1985, Dalton worked 421.5 hours of overtime and received $9,343.42 in overtime compensation.

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

17. The position of area service restorer with respondent requires electrical and mechanical expertise, an ability to do line work and an ability to troubleshoot. Customer service is an important aspect of the job.

18. Complainant was qualified for the position of area Service restorer.

19. Dalton had worked as a line mechanic D, the lowest classification in the line department, with respondent for seven months from October 1, 1978 to June 12, 1979. Dalton was inactive due to a strike from May 1, 1979 to June 12, 1979.

20. Complainant was a lineman for W. P. Coal Company from 1975 until the date of the hearing herein.

21. Complainant received 30 hours of advanced lineman training from respondent in 1973.

22. During his prior seven month employment with respondent, Dalton received a written reprimand for an altercation with his supervisor.

23. During his 17 years with respondent, complainant received no written reprimands.

24. During his prior employment with respondent, complainant once accepted a position in the Man area, but decided to decline before beginning the job because such a move would disrupt his childrens school and sports activities. By 1983, complainant's children had grown and this factor no longer hindered his moving to the Man area.

25. During a strike which occured while in his previous employment with respondent, complainant once was involved in a heated oral exchange with a supervisor. Complainant was not disciplined for this conduct and it was not cited as a problem on his evaluation.

26. Respondent utilized subjective criteria in filling the area service restorer position at issue in this case.

CONCLUSIONS OF LAW

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

2. Appalachian Power Company is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of age discrimination.

4. Complainant has demonstrated that the reason articulated by respondent for its failure to hire complainant is pretextual.

5. Respondent discriminated against complainant on the basis of his age by failing to hire him in violation of the Human Rights Act, West Virginia Code, §5-11-9(a).

DISCUSSION OF CONCLUSIONS

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

In the instant case, complainant has established a prima facie case of age discrimination. The parties have stipulated that complainant was born on October 10, 1937 and that he was 45 years old at the time he applied for the area service restorer position; that in 1983 respondent had open a position for area service restorer;

that complainant applied for said position and was rejected by respondent. Respondent does not contest that complainant is qualified for the position of area service restorer. Such facts are sufficient to make a prima facie case of age discrimination because, if otherwise unexplained, the raise an inference of discrimination. Furnco Construction v. Waters 438 U.S. 567 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for its failure to hire complainant. It was the testimony of respondent's witnesses that Dalton, the successful applicant, was more likely to stay in the Gilbert area because he was more "dependable" and "steady". Respondent's witness testified that complainant in his previous employment with respondent decided not to move to the Gilbert area. Respondent also alleged certain other problems with complainant, including the following: Complainant's filing of grievances, complainant's reported on the job injuries, and drunken driving problems. These factors, however, were not considered by the persons as who made the decision not to hire complainant, and are not considered as respondent's reason for not hiring complainant herein.

Complainant has demonstrated that the reason articulated by respondent for its failure to hire complainant is pretextual. The testimony of complainant's witnesses was more credible because of their demeanor then the testimony of respondent's witnesses. In addition, respondent's witnesses testimony was impaired by several

problems. For example, Dalton, the successful applicant, was employed by respondent for only seven months; whereas complainant was previously employed by respondent for seventeen years.

It was clear from the testimony of the persons who made the decision not to hire complainant that they did not consider the prior work records of complainant and Dalton. Complainant's vast experience in the components of the job of area service restorer was far superior to that of Dalton. Moreover, Dalton had a written reprimand in his brief work history with respondent. Complainant in his seventeen years had no written reprimamds from respondent.

One of the major alleged concerns of respondent was the fact that complainant decided not to move to the Man area in his previous employment with respondent after initially deciding to move to the Man area. Yet the record is clear that respondent never investigated complainant's reasons for failing to move to the Man area. Complainant changed his mind with regard to said move because at the time his children were involved in various school and sports activities that would have rendered said move very disruptive to complainant's family. By 1983, however, complainant's children had grown, and the situation was different. Respondent merely assumed that complainant would not move.

Respondent's witnesses also alleged that on one occasion complainant was abusive to his supervisor. The context of this oral abuse, however, was a strike situation. As the supervisor attempted to cross the picket lines, a heated oral exchange ensued.

Complainant was disciplined for this incident, and his evaluations did not cite this incident as a problem. It must be concluded, therefore, that said incident was not the reason the complainant was not hired as area service restorer.

Respondent claims that Dalton was selected because he was more "settled" and "dependable". These employment criteria are extremely subjective. Subjective employment criteria are not in themselves violations of the fair employment laws, but the use of subjective criteria does warrant special scrutiny and has been viewed with disfavor and skepticism. Rowe v. General Motors 475 F.2d 348, 359 (5th Cir. 1972); Stover v. Consolidation Coal Company (W.WV. HRC). The reason for the skepticism and special scrutiny of subjective employment criteria is illustrated by the manner in which respondent applied such criteria in the instant case. Respondent determined that Dalton, the younger person who was living with his father was more likely to move than complainant, the older person. Respondent utilized such indicators of dependability as personal life to reach the conclusion that Dalton would be more available to work overtime. It is exactly this type of stereotypical thinking based upon subjective employment criteria that the fair employment laws were designed to stop.

Based upon the foregoing, it must be concluded that the reason articulated by respondent is pretextual.

RELIEF

Because of respondent's discriminatory failure to hire complainant because of his age, complaiant is entitled to instate-

ment to the position of area service restorer. In addition, complainant is entitled to back pay in the amount of $10,839.69 pursuant to the calculation established in complainant's brief. Complainant also claims relief for humiliation and loss of dignity, yet the record evidence does not establish that he sustained such damages as a result of respondent's age discrimination, and it is not recommended that he be awarded any such damages.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner hereby recommends the following:

1. That the complaint of Richard Trammell, Docket No. EA-196-84 be sustained.

2. That respondent hire complainant as an area service restorer.

3. That respondent pay complainant the sum of $10,839.69 as back pay.

4. That respondent be ordered to cease and desist from discriminating against individuals on the bases of their age in making employment decisions.

5. That respondent report to the Commission within 60 days of the entry of the Commission's Order, the steps taken to comply with the Order.

James Gerl
Hearing Examiner

ENTERED: May 9, 1986

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing PROPOSED ORDER and DECISION by placing true and correct copies thereof in the United States Mail, postage prepaid, addressed to the following:

Thomas T. Lawson
Woods, Rogers & Hazlegrove
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Roanoke, VA 24004

Joseph M. Price
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Jeffrey VanGilder
Assistant Attorney General
State Capitol, Room WW-435
Charleston WV 25305

on this 9th day of May, 1986.

James Gerl