STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Quewanncoii C. Stephens
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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

May 22, 1992

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Sharon Mullens, Esq.
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Charleston, WV 25302

Re: Watkins v. WV Dept. of Energy
ES-452-86

Dear Parties:

Enclosed, please find the final decision of Hearing Examiner H. F. Salsbery in the above-referenced matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appel-

lant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission.

The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, please feel free to contact me at the above address.

Sincerely yours,

Quewanncoli C. Stephens
Executive Director

QCS/GSG/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RHONDA WATKINS,

Complainant,

v. Docket No. ES-452-86

WEST VIRGINIA DEPARTMENT OF ENERGY,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE HEARING EXAMINER

This case was heard on June 24, June 25, July 22, July 23, 1991 and by evidentiary deposition taken on August 19, 1991.[1] The complainant appeared in person and by her counsel, Sharon M. Mullens, Esquire, and the respondent appeared through its representative Sandra Kee and its counsel, Shirley A. Skaggs, Esquire.

After having heard the evidence, both during the hearing and that offered by evidentiary deposition, and after having reviewed the documents admitted as exhibits, the hearing examiner makes the following recommended findings of fact and conclusions of law:

FINDINGS OF FACT

1. The complainant was an employee of the Department of Energy (the DOE), formerly the Department of Natural Resources (the DNR)

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[1]By agreement of counsel for the complainant and respondent, their respective proposed findings of fact and conclusions of law were to be presented on or before April 17, 1992. The delay between the taking of the evidentiary deposition on August 19, 1991 and the submission of proposed findings by the parties, was the result of delays in the preparation of the deposition transcript and the hearing transcripts.

in the Abandoned Mine Lands (the AML) section as an Appraiser II.

2. The complainant is a female and the successful applicant is a male.

3. The complainant applied for the position of Assistant Administrator II in November of 1985.

4. The complainant became aware of the opening through various sources including posting and "word of mouth."

5. The complainant applied and interviewed for the position of Assistant Administrator II.

6. The position of Assistant Administrator II was awarded to another DOE employee who was, at the time of his promotion to Assistant Administrator II, employed at DOE as an Assistant Administrator I.

7. The successful applicant was a college graduate.[2]

8. The complainant was a college graduate with an associates degree in business administration. In addition, she had completed a substantial number of course hours in appraisal; had worked as a real estate agent; had supervised other real estate agents; had supervised other employees within the DNR, albeit on an ad hoc and unofficial basis; had devised and created the realty section of AML; had created and modified forms for use by AML; had worked in her current job for several years with generally satisfactory job performance evaluations; had been evaluated on at least one occasion for her supervisory abilities while at DNR/DOE and had, in

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[2]The successful applicant's degree was in finance, an area not readily identifiable as being particularly relevant to the job description of Assistant Administrator II.

general, met the job description qualifications for the position of Assistant Administrator II.

9. The complainant had helped train, on an unofficial and semi-official basis, several employees of her agency.

10. The complainant was not hired for the position of Assistant Administrator II.

11. The beginning salary for the position of Assistant Administrator II was $29,000 per year.

12. The successful applicant held the position of Assistant Administrator I prior to being promoted to the job in question, Assistant Administrator II.

13. The successful applicant was the only applicant (of four who applied) who was interviewed by the then Secretary of the Department of Energy, Kenneth Faerber, prior to the posting of the position and its being awarded.

14. The successful applicant had less experience in the AML section and in appraisal work than did the complainant.

15. The complainant had been absent from work for health and other family reasons for a substantial number of days during her tenure with DNR/DOE but her absenteeism was within the acceptable range and was not criticized during evaluation. In addition, the respondent's witnesses testified that her absenteeism and her manner and method of handling both her sick days and annual leave were within agency's guidelines.

16. The successful applicant had no administrative, real estate or appraisal experience prior to coming to DNR/DOE while the

complainant did.

17. The successful applicant filed his application prior to the announced date when applications would be accepted.

18. While I did not find any of the witnesses to be inherently incredible, I did find more corroboration and logic in the testimoney of the complainant's witnesses. To the extent that any of the witnesses' testimony is inconsistent with this opinion, I find that it was not supported or was controverted by other evidence which I found to be more persuasive.

ISSUES PRESENTED

1. Was the complainant unlawfully discriminated against based on sex by the respondent in denying her promotion to the position of Assistant Administrator II? If yes, to what damages is she entitled?

CONCLUSIONS OF LAW

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

2. At all relevant times, the respondent, the West Virginia Department of Energy, was an employer within the definition of the West Virginia Human Rights Action, 5-11-3(d), West Virginia Code.

3. At all relevant times, the Complainant, Rhonda Watkins, was a citizen and resident of the state of West Virginia, a person within the definition of 5-11-3(a), West Virginia Code and employed by the respondent.

4. On or about March 19, 1986, the complainant filed her verified complaint with the commission charging the respondent with engaging in one or more discriminatory practices within the definition of 5-11-9, West Virginia Code. The dominant issue raised in her complaint was that she was denied promotion in December, 1985 because she was a female.

5. The commission found probable cause to exist that the complaint had been discriminated against by the respondent in the terms, conditions and privileges of her employment on the basis of sex.

6. Discrimination based upon such factors as race, religion, sex, national origin, age, etc. is prohibited.

7. Discrimination in compensation is a continuing violation for as long as such compensation disparity exists so that each paycheck at the discriminatory rate is a separate violation in a chain of violations.

8. The complainant is a member of a protected class.

9. The respondent made a promotion decision adverse to the complainant.

10. The respondent's promotion decision would not have been made but for the complainant's protected status.

11. The complainant has met her burden of proof in establishing that she was discriminated against based on sex by the respondent in failing to promote her to the position of Assistant Administrator II.

12. The respondent's articulated reasons for not hiring the

complainant have been successfully rebutted by the complainant and are pretextual.

13. The complainant's damages include back pay, front pay, incidental damages and attorney's fees.

14. The complainant is entitled to a cease and desist order against the respondent prohibiting future violations of the Human Rights Act in the course of its business.

DISCUSSION

This case, after filing, has a long and tortured history. It has been delayed far too long and should have been decided years ago.[3] Notwithstanding, the witnesses for both parties seemed knowledgeable as to the facts and no prejudice to the parties was alleged as a result of the long pendency of this action.

It seems clear to the undersigned that the complainant was qualified for the job in question, Assistant Administrator II, that she was the victim of a "good ol' boy" network within the Department of Energy which, by a preponderance of the evidence, was the result of the management policies of its then Secretary, Mr. Faerber. As a result of these policies, it is likely that certain of the career DNR/DOE professionals were ignored in favor of political favorites. While it cannot and has not been denied that

[3]The fault for the delay cannot be attributed to current counsel for either party. Counsel for the parties, Ms. Skaggs for the respondent and Ms. Mullens for the complainant, acted with all reasonable speed considering the nature of the case and the stage of the proceedings. Normally, the issue of delay would not be considered by this or any court in making its decision. However, where, as here, an important element of damages is inherently tied to time, i.e. back pay, then delay may be important.

the successful applicant was a career department employee, it is likewise undeniable that given the opportunity the complainant would have likely made the department her career. Her demonstrated commitment to her job in terms of creating the position from ground zero, in terms of helping the appraisers in the northern and southern offices, in terms of learning and becoming conversant with the applicable law and its changes, in terms of creating and modifying the forms used by the division, in terms of supervising the work product of her co-workers and in other ways clear from the record, leave the undersigned with little doubt as to her professional competence and commitment. In areas where the undersigned did have significant questions concerning Ms. Watkins, i.e. absenteeism and ability to get along with others, the respondent conceded that the complainant's absenteeism was within acceptable limits or failed to produce sufficient evidence of her alleged inability to get along with other members of the section. That being true, it is assumed that the impact of these areas on the promotion decision was of little importance.

The courts have long held that the burden of proving discrimination lies with the complainant and the burden is one of preponderance of the evidence. Rebuttal is, of course, also by preponderance. This state, in Conway v. Eastern Associated Coal Company, 358 S.E.2d 423 (1986), set out the test by which discrimination cases are judged.[4] It is the third prong of the

[4]In Conway the court said that the complainant must prove, by a preponderance of the evidence, the following: that the employee is a member of a protected class; that the employer made a decision

Conway test which is the most difficult to prove and which most often is at issue in these type cases. Therefore, Conway held that the employee/complainant could prove the "but for" requirement by inference and direct or even strong circumstantial evidence is not required. Cf, State ex rel State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, 329 S.E.2d 77 (WV 1985). Here the evidence was that the complainant, Rhonda Watkins, had an associates degree in business administration,[5] had substantial, long-term and diverse real estate and real estate appraisal experience, had created not only her own position but assisted others in the performance of their job duties, created the forms used by the division in which she worked, modified those forms from time to time to conform them to changes in the law, assisted her fellow employees in the performance of their job duties, supervised the work product of at least two of her co-workers, and generally committed herself to the success of her division of the DOE. The complainant had been in the program since its inception. By comparison, the successful applicant was substantially unfamiliar with the program that he was going to be

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adverse to the employee effecting the employees employment, pay, promotion, etc.; and that the employer's decision would have been different but for the employee's protected status.

[5]The respondent points out in its proposed findings of fact and conclusions of law that the successful candidate had a four year degree while the complainant did not. It does not seem to this hearing examiner that in this context the type degree, i.e. associates versus bachelor of arts, would be as important as the course of study. Here the complainant's business administration degree would seem more applicable to the job description of Assistant Administrator II than the finance degree of the successful applicant.

administering. Therefore, in terms of comparative education and experience qualifications, the complainant was at least as qualified as the successful applicant.

The remaining major issue raised during the hearing of this case was the supervisory experience and ability to supervise of the successful applicant as compared to the complainant. Clearly, the complainant had been supervising not only herself but several of her co-workers, had been instructing her co-workers in various aspects of the job and had been, at least in part, treated as an intermediate supervisor by her own supervisor. Her supervisory capabilities were even evaluated on one occasion although the reason for having done so was never satisfactorily explained by the respondent. The undersigned believes that in light of her past supervisory experience[6] and her implicit supervisory experience in the job of Appraiser II, the complainant's supervisory experience and skills exceeded those of the successful applicant.

Having made the findings set out hereinabove, the undersigned next examined the explanations offered by the respondent both as to the allegations made by the complainant and her witnesses but also as to the uncontroverted facts as they are known to exist. First, the essence of the respondent's case seems to lie in the not inconsistent defenses that the successful applicant was better qualified than the complainant or that the complainant was

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[6]The complainant had, without contradiction, acted in a supervisory position in her previous employment. In addition, her supervisory positions had been ones involving the critical areas here, i.e. real estate and real estate appraisals.

unqualified for the job for which she had applied. These defenses, though well presented, do not, in the opinion of the undersigned, rise to the level of successfully refuting the complainant's case. As is pointed out hereinabove, the undersigned has found as a matter of fact that the complainant was as qualified educationally as the successful applicant, that the complainant was more qualified in her real estate and real estate appraisal experience than the successful applicant and that the complainant was more qualified as to her supervisory experience in both this division of the DNR/DOE and in previous employment than the successful applicant. In light of this finding, the qualification defenses advanced by the respondent must be found to be pretextual and insufficient as a matter of law to rebut the complainant's position.

Having arrived at the conclusion that the complainant was unlawfully discriminated against in her employment by the respondent, the issue left for recommendation is damages. Unfortunately, the record is not as clear on this issue as it could be. But there is more than sufficient record upon which to base an award. The damages are these: the complainant is entitled to back pay, she is entitled to front pay since she cannot be restored to her job, she is entitled to incidental damages not to exceed $2,500 and she is entitled to reasonable attorney's fees and costs.

It is on the issue of back pay that the question of delay arises. It seems unfair to punish the respondent for the failure of the complainant to actively pursue her cause of action. By the

same token, it is unfair to punish the complainant because of the failures of either the respondent agency or the commission in not timely bringing this case to resolution. After all, it can hardly be said that a defendant may simply sit and do nothing while a case stagnates and then assert or adopt lack of diligence on the part of a plaintiff in an effort to limit damages. Therefore, this issue should be decided in favor of the complainant.

CONCLUSION

It is the recommendation of the undersigned that the complainant recover from the defendant, back pay in amount equal to $29,000 per year which will include employment benefits less her interim earnings from January 1, 1986 to the date hereof, front pay in the amount of $14,500, incidental damages in the amount of $2,500 and attorney's fees in the amount of $15,500.[7] In addition, the complainant is awarded her costs associated with the bringing of this action.

Dated this 30th day of April, 1992.

H. F. Salsbery
Temporary Hearing Examiner

[7]Based upon the nature and complexity of the case and the diligence required to move this case to hearing and conclusion, present counsel for the complainant is clearly entitled to the fee awarded. However, for purposes of clarity it should be understood that complainant's former lawyer(s) are not awarded any fee.