



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

TELEPHONE 304-348-2616

2 July 1990

GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

Dan L. Hardway, Esquire
Counsel for Complainant
P. O. Box 6225
Charleston, WV 25362

Michael J. Bulka
102 Meigs Avenue
Clarksburg, WV 26301

Norman T. Farley, Esquire
Counsel for Respondent
363 Washington Avenue
Clarksburg, WV 26301

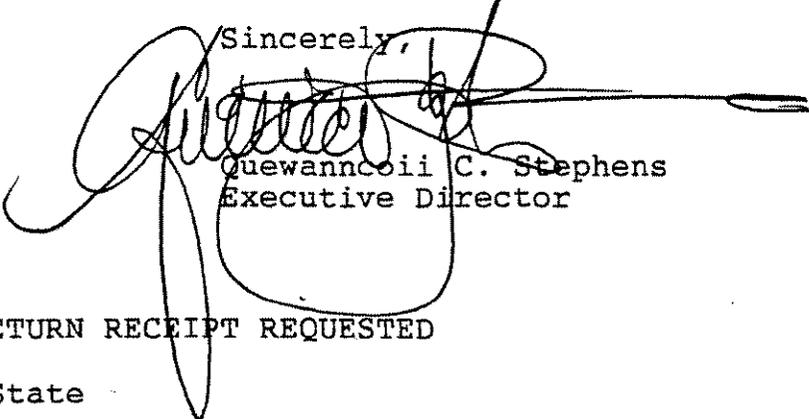
Harrison County Board
of Education
P. O. Box 1370
Clarksburg, WV 26301

Re: Bulka v. Harrison County Board
of Education
Docket No. EH-214-88

Dear Parties and Counsel:

Herewith, please find the Final Order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for a review of this Final Order.

Sincerely,


Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHAEL J. BULKA,

Complainant,

v.

DOCKET NO. EH-214-88

HARRISON COUNTY BOARD
OF EDUCATION,

Respondent.

FINAL ORDER

On 11 April 1990 the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law filed in the above-styled matter by hearing examiner Gregory T. Hinton. After consideration of the aforementioned, and a thorough review of the transcript of record, arguments and briefs of counsel, and the exceptions filed in response to the hearing examiner's recommendations by both parties, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, except for such modifications and amendments as set forth immediately hereinbelow:

A. In the section entitled "Conclusions of Law," paragraph 5 is stricken in its entirety, and the following paragraph is substituted:

As a result of respondent's unlawful discriminatory acts, complainant is entitled to reinstatement, back pay, prejudgment interest on back pay, compensation for out-of-pocket medical expenses, and incidental damages, all as more fully set forth hereinbelow.

B. The section entitled "Order" is hereby modified to read as follows:

Having determined that respondent violated the West Virginia Human Rights Act by unlawfully discriminating against complainant as a result of his handicap and sex, the West Virginia Human Rights Commission, adjudges, orders and decrees as follows:

1. The complaint of Michael J. Bulka against the Harrison County Board of Education, Docket No. EH-214-88, is sustained.

2. Respondent shall reinstate complainant to his position as a teacher's aide in the Adamston Elementary School EMI classroom, or, if such position is not now available, shall place him in a similar position as a teacher's aide in an EMI classroom at a school convenient for petitioner, or, if no such similar position is available, shall provide him with such training as may be necessary to make him able and competent to perform the duties of whatever teacher's aide

position is available. Complainant shall be paid the regular monthly salary of a teacher's aide until such time as he is gainfully employed in such position by the respondent or until he rejects or refuses to accept respondent's offer of suitable employment. Complainant shall remain under a duty to mitigate his damages.

3. Respondent shall pay to complainant back pay in the amount of \$13,108, which represents full compensation for the 1987-1988 school year, and three months (September, October, November) of the 1988-1989 school year.

4. The respondent shall reinstate to complainant credit for all sick, personal, and other leave which he would have accumulated from his last date of employment up to November 1988.

5. The respondent shall pay complainant prejudgment interest on his back pay at the rate of ten percent per annum, compounded annually, from the date of his discharge up until the date of this final order, or the sum of \$2,811.70.

6. The respondent shall pay to complainant the sum of \$2,500 for incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity suffered as a result of respondent's unlawful discriminatory acts.

7. The respondent shall pay to complainant the sum of \$765 in medical expenses, and shall also be responsible for an additional six months of expenses for mental health care should complainant be in need of the same.

8. The respondent shall pay to complainant and his counsel the sum of \$13,925 in attorney's fees (for 139.25 hours at the rate of \$100 per hour), and expenses and costs of \$2,071.11.

9. The respondent shall cease and desist from discriminating against individuals on the basis of their handicap or sex in making employment decisions.

10. The respondent shall report to this Commission within thirty (30) days of the entry of this order concerning the steps taken to comply with this order.

It is, therefore, the order of the Commission that the hearing examiner's recommended findings of fact and conclusions of law be attached hereto and made a part of this final order, except as amended by this final order.

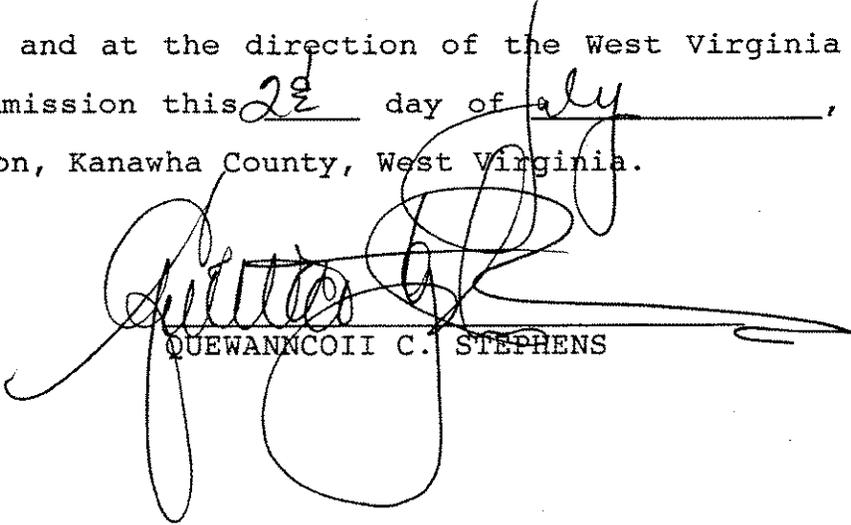
By this final order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they have ten (10) days to

request that the Human Rights Commission reconsider this final order or they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22 day of July, 1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

IN THE MATTER OF:

MICHAEL J. BULKA,

Complainant,

V.

DOCKET NO: EH-214-88

HARRISON COUNTY BOARD OF EDUCATION

Respondent.

PROPOSED ORDER AND DECISION

1. Preliminary Matters

A public hearing for this matter was convened November 9 and 10, 1988, in Clarksburg, West Virginia. The Complaint was filed on November 13, 1987. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

2. Contentions of the Parties

Complainant contends that he was transferred as a result of his handicap.

Respondent contends that Complainant's transfer to a preschool handicap class was made in the best interest of the students and not for discriminatory purposes.

3. Findings of Fact

Based upon the preponderance of the evidence, the hearing examiner has made the following findings of fact:

1. Complainant is a white male.

2. The Complainant is "handicap" within the meaning of West Virginia Code 5-11-3(t).

3. At the time of the hearing, Complainant lived at home with his parents and had never lived away from home.

4. Complainant was one of two males employed by the Respondent, Harrison County of Education, as a classroom aide.

5. Complainant was one of two handicap persons employed by the Respondent, Harrison County Board of Education, as a classroom aide.

6. Complainant was diagnosed at the age of three (3) as being mentally retarded as a result of brain damage sustained during birth.

7. Complainant's handicap condition was known to the Respondent, Harrison County Board of Education, when he was first employed and at all times thereafter.

8. Complainant is handicapped by a learning disability with probable minimal brain damage and epilepsy. The handicap's major impact is in the area of verbal behavior and that Complainant has difficulty expressing himself and difficulty understanding abstract verbal concepts.

9. The Respondent, Harrison County Board of Education, is a county school district charged with the supervision and control of education for Harrison County, West Virginia.

10. The Respondent, Harrison County Board of Education, is an employer within the meaning of West Virginia Code 5-11-3(d).

11. The Complainant is an employee within the meaning of West Virginia Code 5-11-3(e).

12. A Memorandum of Agreement was entered into by the Division of Vocational Rehabilitation, Michael J. Bulka, and the Harrison County Board of Education, to jointly provide the Complainant with on-the-job training as a teacher's aide.

13. Said training was commenced on November 24, 1980, and terminated on June 5, 1981.

14. An addendum to said Memorandum of Agreement specified "that upon the successful completion of this on-the-job training, a shared, concerted effort will be attempted by all parties to place Complainant as a teachers aide in any available such vacancy within the Harrison County area."

15. The Complainant was trained to be a classroom aide by Mary Melko in a program sponsored by the Department of Vocational Rehabilitation. Ms. Melko trained the Complainant to work with the learning disabled and educable mentally impaired children in aide-type functions such as assisting with instructions, with their math, phonics, their reading, and their spelling.

16. Complainant's training pursuant to the Memorandum of Agreement was very successful and all parties were very happy with Complainant's progress and ability.

17. At the completion of his training, Complainant had the range of skills and abilities necessary to be a teacher's aide in an EMI classroom in the Harrison County School system.

18. Subsequent to his training, the Complainant did volunteer work in a special education classroom taught by Mr. Ricky SanJulian and performed very well as an aide.

19. The Complainant was hired by Respondent on July 20, 1982, for the school year of 1982-1983 as a curriculum aide in Ruth Flint's classroom at Adamston Elementary School after considerable efforts and complaint by Mary Bulka, Complainant's mother, informing the Respondent that they were in noncompliance of federal and state regulations.

20. The Complainant was the only classroom aide employed by the Respondent who received training before employment.

21. Complainant was employed as a classroom aide in an Educable Mentally Impaired (EMI) classroom at Adamston Elementary School by respondent Harrison County Board of Education.

22. Complainant worked in his position at Adamston for five years consistently receiving good periodic employment evaluations.

23. Complainant was competently and satisfactorily performing his job duties as a teacher's aide in Ruth Flint's EMI classroom prior to his transfer to the Preschool Handicap classroom.

24. On complainant's last employment evaluation he was rated as either effective or highly effective in every category. The tenor of a meeting held to review the evaluation was that complainant was doing a good job in Ruth Flint's classroom but

that he needed to improve a little bit here and there. It was suggested that Complainant could be more creative.

It was also felt at that time that Ruth Flint was not utilizing Complainant as fully as she could have.

25. It is highly probable that Complainant's job skills and emotional stability on the job may have deteriorated because he was not given the support minimally needed in the employment situation by Ruth Flint.

26. Sex is not a bona fide job consideration or qualification with either the EMI classroom position or the Preschool Handicap classroom position. Sex was not listed as a qualification on Respondent's job description for a teacher's aide.

27. At the time of the hearing herein Complainant was still employed by the respondent Harrison County School Board but was on an approved medical leave of absence.

28. Plans for better utilization of Complainant in the classroom, including accommodation of Complainant by daily planning, direction and supervision were discussed with Ruth Flint. The plans were not effectuated in that Ruth Flint did not begin to use daily planning with Complainant and did not cooperate with the plan to increase utilization of Complainant in the classroom. As a result the principal of Adamston Elementary School began to discuss transferring Complainant to another classroom where he would be used by the teacher.

29. Gale Bentz's evaluation of the problem leading to the transfer of Complainant to the Preschool Handicap class was not any problem with Complainant's performance but that Complainant was not being utilized to his fullest extent and therefore he had become unhappy and ineffective.

30. The idea to transfer Complainant to the Preschool Handicap class originated with James Eakle, Principal of Adamston Elementary School. Gale Bentz, who was Complainant's vocational counselor, did not investigate the class or analyze the transfer in terms of Complainant's work skills, ability and training. Mr. Bentz did not agree or disagree with the transfer but relied upon Mr. Eakle's judgment.

31. At the end of the 1986-1987 school year Complainant was transferred to the preschool handicap class at Adamston Elementary School. Complainant was not trained for the job in the preschool handicap class. Prior to his actual transfer Complainant thought that he was being asked to try out in the Preschool Handicap class with the option of returning to the EMI class if he could not do the work in the Preschool Handicap class. He did not learn that his transfer was permanent until his last day at work when the principal told him that he would not move him back to Ruth Flint's classroom.

32. Classroom aides employed by the respondent Harrison County School Board are assigned to specific classrooms. The respondent Harrison County School Board does not normally transfer aides within the school system without first posting the

position as being vacant and allowing interested employees to bid for the position. The transfer of Complainant from the EMI class to the Preschool Handicap class was the only instance of a transfer occurring without the position being posted.

33. The field of special education is generally subdivided into areas based upon the diagnosis of the problem suffered by the student; i.e., Behavioral Disorder indicates that the student's major problem is a behavioral one, EMI would indicate that the student has an impairment that affects his learning ability but is socially and academically educable, LD would indicate an average or better intelligence but with a perceptual problem affecting learning disability. The preschool handicap class has very young students with all the different types of handicaps ranging from physical handicaps to behavior disorders, etc. Many of the students do not even have the most basic living skills such as going to the restroom, feeding themselves, walking and the like. The Preschool Handicap class that Complainant was transferred to had severely handicapped students in it including students who could not talk, students who could not walk, students who had to be fed and students who had to have their diapers changed. Complainant was not trained to deal with students with these types of problems.

34. The Preschool Handicap class is a more difficult group of students to work with in that they do not have beginning school skills, discipline skills and are real froward. The students are

not used to school and it requires expertise in the area to work with them.

35. Complainant in working in the Preschool Handicap class would not have an opportunity to use the skills he acquired by his training under the Memorandum of Agreement between the Division of Rehabilitation Services and the parties and Complainant did not receive any training which would have prepared him for the Preschool Handicap class.

36. Mary Melko testified that Complainant would have a difficult time working in a Preschool Handicap class without the proper training.

37. Dr. Samuel Goots testified that Complainant's problem with the transfer arose from his handicap. Complainant "had difficulty in flexibility and in readjusting to the situation" without proper preparation.

38. Complainant was replaced by a non-handicapped female in the EMI classroom.

39. Complainant's handicap could easily have been accommodated by the Respondent but such accommodation was not made.

40. In attempting to work with Complainant in the last year he was assigned to Ruth Flint's classroom, Ruth Flint was not accommodating of Complainant's disability. The situation had deteriorated to the point that Gale Bentz felt that any change for Complainant would be better for him than leaving him with Ms. Flint.

41. Transferring Complainant to the Preschool Handicap class was an accommodation of Ruth Flint's discrimination against Complainant and unwillingness to use him in the position for which he was trained for and was not an accommodation of complainant's handicap.

42. In working with a handicap individual such as Complainant, emotional support and positive feedback are essential attributes of maintaining the positive work performance of the handicapped individual. Criticism and lack of support result in a decrease in emotional stability and job skills.

43. The amount of support that Complainant needed did not render him unable to perform the functions of his job, nor was it difficult or unreasonable for Respondent.

44. Mary Melko accommodated Complainant's handicap by daily review of lesson plans, assuring clarity of supervision, and maintaining consistency in the structure of the class. Such accommodation was reasonable and was directed toward the specific handicap that Complainant had and was recommended as an accommodation that could have been made of his handicap by the Respondent.

45. Such an accommodation was necessary due to the fact that Complainant's handicap made it necessary that he know what was expected of him and when it was expected. Ruth Flint never made such an accommodation of Complainant and did not regularly meet with him regarding his duties and responsibilities and her expectations.

46. During Complainant's training he was required to do daily lesson plans which were reviewed on a daily basis by his teacher. Mary Melko had the Complainant maintain a notebook of his assignments and met with him daily to review the day's assignments and to plan the next day's assignments. Such an accommodation was reasonable and was not an unnecessary burden upon the teacher or respondent Harrison County School Board and enabled Complainant to function effectively in his job duties in spite of his handicap. James Eakle considered requiring Ruth Flint to make this accommodation of Complainant's handicap but did not do so after being ordered to not make any accommodation by his supervisors.

47. Ricky SanJulian, Supervisor of Pupil Services, testified that he directed the principal of Adamston Elementary School to treat Complainant as if he did not have any handicap and to make no accommodation for him. James Eakle testified that absent such an instruction he would have handled the situation differently and would have tried to accommodate Complainant's handicap.

48. The transfer of Complainant from the EMI class to the Preschool handicap class was not an accommodation of Complainant or his handicap but was an accommodation Ruth Flint who either did not want Complainant as her aide due to his handicap, or did not want to give the Complainant the support needed to perform his job satisfactorily.

49. Respondent discriminated against Complainant on the basis of his handicap and his sex.

50. In 1985 Ruth Flint believed that Complainant would be transferred from her classroom and gave him a going away card with all the children's names signed to it along with a going away present. When Complainant returned to her classroom the following year she was upset. Complainant was saddened by the manner in which he was treated by Ruth Flint.

51. Ruth Flint had begun, during Complainant's employment, and before the filing of this Complaint, to attempt to get Complainant transferred out of her classroom. She felt he was not capable of the job and should be transferred to a janitorial or clerical job. Ms. Flint's efforts culminated in Complainant's transfer in 1987.

52. The attitude of discrimination maintained by Ruth Flint is reflected by the fact of her stereotyping of Complainant's employment related skills. Ruth Flint felt that Complainant was employable as a janitor or an office boy - jobs stereotyped for learning disabled persons - but not as a teacher's aide. Ms. Flint's attitude was all the more remarkable in that she was the only person to appear before the Commission who questioned Complainant's ability to adequately perform the job duties of a teacher's aide with reasonable accommodations.

53. Ruth Flint's attitude toward Complainant was further reflected in her suggestion that he obtain a job outside the education field; in her lack of respect for Complainant and her

creation of a situation of lack of discipline in her classroom that could be blamed on the Complainant so that she could obtain his transfer.

54. In the last year that Complainant worked in Ruth Flint's classroom she would not allow him to work with the children and treated him as if he were not there in the room.

55. Ricky SanJulian, respondent Harrison County School Board's Supervisor of Pupil Services, was aware of laws relating to discrimination against handicapped employees and further of the laws that required reasonable accommodations for handicapped employees. Mr. SanJulian, however, could not articulate any reason why he felt that those laws did not apply to Complainant or why he directed the principal of Adamston Elementary School to disregard those laws in dealing with Complainant. Mr. SanJulian initially testified that there was nothing in Complainant's personnel file to indicate that he was handicapped. Under cross-examination Mr. SanJulian finally admitted that he had not even looked at Complainant's personnel file to determine whether there was anything in it that would indicate a handicap prior to issuing his direction concerning Complainant's case. Moreover, Mr. SanJulian had personal knowledge from working in the classroom with Complainant that Complainant suffered from a mental impairment, and had that knowledge within the meaning of 34 C.F.R. 104.3(J). Mr. SanJulian maintained that there was not document in Complainant's personnel file that indicated he was handicapped in spite of the obvious fact that such documentation existed.

56. Mr. SanJulian attempted to justify his conduct, and that of the Respondent, in this case by arguing that no formal determination of handicap had ever been made in Complainant's case but admitted, however, that there was not formal process maintained by respondent Harrison County School Board for making such a designation.

57. Complainant's sex was a factor considered by the decision makers of the respondent Harrison County School Board in deciding to transfer Complainant from the EMI class to the Preschool Handicap class.

58. Respondent's transfer of Complainant from the EMI classroom to the Preschool Handicap classroom was an adverse employment action. It was adverse in the sense that it was a foreign environment for Complainant. An environment that Complainant was neither familiar with, nor prepared by training. It would be akin to a female working in a sexism workplace, or a black working in an environment replete with racial slurs and epithets.

59. Complainant had difficulty with tasks assigned in the preschool handicap class and with the perception of his handicap by parents of students in the preschool handicap class. Complainant also had problems in the class due to the nature of the tasks required of him and the fact that he had not been trained for the tasks.

60. On Complainant's last day at work he asked the principal of Adamston Elementary School, James Eakle, whether he would be

allowed to return to the position for which he had been trained, aide in an EMI classroom. When Mr. Eakle informed him that he would not, he became very upset and left work.

61. Complainant was told by the principal that he would have to change diapers of female students even though the principal had earlier promised in writing that such a job duty would not be required of him.

62. Complainant filed a grievance as a result of his transfer to the Preschool Handicap class. The grievance was withdrawn after a hearing was held in which Complainant did not proceed with the hearing due to the respondent Harrison County School Board's refusal to accommodate Complainant's handicap at the hearing.

63. Complainant is the member of a class protected by the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq., in that he is handicapped and a male as previously found. He is handicapped in that he has shown that he was a mental impairment that substantially limits one or more of his major life activities.

64. Respondent Harrison County School Board took adverse employment action against Complainant in that they transferred him to a position for which he was untrained and unable to perform amounting to a constructive discharge from employment, all of which occurred after respondent failed to reasonably support the Complainant in the position for which he was trained and in which he was performing effectively.

65. Complainant has shown, as previously found, that he was qualified to do his job and was doing it well ruling out inadequate job performance as a reason for the adverse employment action taken.

66. Complainant was replaced by a female who was not handicapped.

67. The employer failed to articulate any non-discriminatory reason for the transfer of Complainant to the Preschool Handicap class inasmuch as Respondent has euphemistically blamed Complainant as victim and criminal, i.e., respondent blames the complainant for a situation created by respondent and yet sought to give complainant a remedy.

68. Respondent Harrison County School Board alleged that Complainant had problems with disciplining some of the older children in Ruth Flint's classroom.

69. James Eakle testified that on his final evaluation of Complainant that there was an area that needed improvement but was not such as would rise to the level of requiring remediation. However, the testimony of the classroom teacher was that the area with which Mr. Eakle was concerned was not viewed by her as being a valid part of the aide position. The respondent Harrison County School Board has not demonstrated how Mr. Eakle's concern formed a nondiscriminatory reason for the employment action in this case.

70. Ruth Flint testified in a July 12, 1988, deposition that she did not expect Complainant to discipline the children in the

class, but that the problem she had with Complainant was that he was disruptive.

71. The employer's reasons advanced for the adverse employment action in this case are pre-textual.

72. Complainant maintained a professional attitude towards the students in his charge.

73. Complainant was not disruptive in Ms. Flint's classroom.

74. Ruth Flint did not support Complainant in disciplining of the students in her class. When he, pursuant to her instruction, wrote the names of misbehaving students on the blackboard she would ignore it. When she left the classroom she would leave a student in charge of the classroom instead of Complainant. Ruth Flint did not teach, nor did she encourage the students to respect Complainant and such was even reflected in the fact that she called him by his first name and not as "Mr. Bulka."

75. If the teacher ignores the aide's use of assertive discipline, as Ms. Flint ignored Complainant, the result is likely to be a breakdown in the discipline of the class. It is a pre-textual reason to thereafter assert that the breakdown in discipline was a justification for adverse employment action taken against the aide.

76. In a special education classroom it is essential for the teacher to support the aide in all discipline situations. If the teacher does not, the aide is not able to function effectively as a disciplinarian.

77. Primary responsibility for discipline in the classroom is the teacher's.

78. When encouraged and supported Complainant exhibited creativity and initiative.

79. Complainant did not have any disciplinary problems in Mary Melko's or Ricky SanJulian's classrooms. He functioned appropriately within the disciplinary system in those classrooms and was supported by the teacher in his disciplinary decisions.

80. The job descriptions of teacher and teacher's aide confirm that the responsibility of discipline in the classroom is that of the teacher's and not the aide's.

81. Ruth Flint never contacted Mary Melko regarding the training Complainant had received nor about the skills and abilities that he possessed.

82. After leaving his job on September 16, 1987, Complainant was examined by Dr. Maurice Rhodes who referred him to a psychologist, Dr. Samuel Goots.

83. Prior to referring Complainant, Dr. Maurice Rhodes diagnosed him as suffering from psychological stress relating to his employment, specifically arising from his transfer from the EMI classroom to the Preschool Handicap classroom and directed that he not work in the latter position. Dr. Rhodes has not released Complainant to return to work.

84. Dr. Rhodes' charge to Complainant for services rendered was Twenty (\$20) Dollars.

85. Dr. Samuel Goots is a Clinical Psychologist who undertook the treatment of Complainant upon Dr. Rhodes' referral. His preliminary diagnosis was learning disability along with anxiety and depression. The anxiety and depression were caused by job related stress. The job related stress arose as a result of the transfer from the EMI class to the Preschool Handicap class.

86. Complainant is a well-motivated person who has some limitations in the areas of learning. As such his job as a teacher's aide was very important to him in gaining self-esteem and a feeling self-worth. It is very important to him to know that he could work day to day and earn his own money. When that was taken away from him Complainant experienced significant emotional difficulties. Complainant's job was fulfillment of everything he had been taught at home and at school.

87. Dr. Goots undertook to treat Complainant for his significant emotional difficulties. However, traditional individual psychotherapy was not very effective due to Complainant's difficulty in understanding abstract concepts.

88. Complainant suffers from an adjustment disorder with mixed emotional features of moderate to severe anxiety and depression as a result of the transfer to the Preschool Handicap class. The cause of the adjustment disorder is job related stress secondary to the transfer to the preschool handicap class.

89. Dr. Goots charged Complainant \$715.00 for his services.

90. Dr. Goots was of the opinion that Complainant could not return to a position as an aide in the Preschool Handicap class.

91. Complainant is not a malingerer, is well motivated to work, and would have been working at the time of the hearing if that were possible. Complainant does not have the same job mobility and freedom that non-handicapped people have and, consequently, he is less able to deal with an unpleasant job that he is unprepared to do and for which he has not been trained. The result is frustration on his part. This is particularly true after Respondent failed to support Complainant in the job for which he was trained and in which he had performed effectively.

92. Respondent Harrison County School Board did not meet the burden of proof in showing any failure to mitigate damages to the extent that such was pled, as a defense to the sexual discrimination charge. It is uncontested that at the time of the hearing, Complainant was still employed by the Respondent and continues to receive benefits from that employment even though he is on a medical leave of absence.

93. Complainant's handicap is such that it makes it difficult for him to find work. Complainant is aware of that limitation and it affects his ability to handle stress.

94. After Complainant's transfer he ceased showing interest in things to his friends.

95. James Eakle's refusal to transfer Complainant back to Ruth Flint's EMI classroom caused immediate emotional injury. He was so emotionally hurt and angry over what had been done to him

that his mother had only seen him in that kind of condition on one other occasion in his twenty-nine (29) years.

96. Plans for Complainant's further independent living such as living separate from his parents and plans to be married have been delayed or deferred as a result of the discrimination he has suffered and the resultant lack of work. His life, in effect, is in limbo.

97. Had complainant worked from September 16, 1987 to November 9, 1988, the date of the hearing held in this case, he would have earned salary in the sum of \$10,120.00 for the 1987-1988 school year and he would have continued to earn \$1,032.00 per month for the 1988-1989 school year. In addition he would have received personal leave during the relevant period at the rate of one and a half days per month and three days personal leave without cause per year.

98. Complainant has not lost other fringe benefits of his employment due to the fact that he still employed by the respondent Harrison County School Board and his benefits are still maintained in effect it is believed.

99. Complainant had accumulated 42.5 days of leave at the time that he went on a medical leave of absence in September, 1987. [Stipulation of parties.] He should have the leave restored to him or, in the alternative he should be compensated for the leave time.

100. Due to the nature and complexity of this case it was necessary for complainant to retain counsel to represent him in this litigation.

101. Ruth Flint's attitude toward Complainant during his five years of working with her was known to him and upset him causing him emotional distress, anger and frustration.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter in this case.

2. Complainant has shown a prima facia case of handicap discrimination and the employer has failed to advance a satisfactory non-discriminatory reason for the action taken in this case and to the extent that reasons have been advanced or suggested they are found to be pretextual.

3. Complainant has established his prima facia case as follows:

a. He is a member of a protected class by virtue of his handicap;

b. The respondent Harrison County School Board took adverse employment action against Complainant;

c. Complainant was performing his job duties in an able, competent and satisfactory manner ruling out inadequate job performance as reason for respondent's actions against the complainant;

d. But for his handicap the adverse employment decisions would not have been made; and

e. Direct evidence of handicap and sex discrimination in the form of testimony regarding Ruth Flint's treatment of and attitude toward Complainant.

4. The Respondent, Harrison County School Board, violated the West Virginia Human Rights by discriminating against complainant, Michael Bulka, on account of handicap and sex.

5. The Complainant, as a result of the Respondent's unlawful discriminatory act, has suffered and should be awarded:

a. Immediate reinstatement as a teachers aide in the Adamston Elementary School EMI classroom by Respondent, Harrison County School Board;

b. Back pay in the amount of \$17,344.00 (\$1,012.00 + 1032 X 7 months) plus reinstatement of leave in the amount of six days of personal leave without cause and nineteen days personal leave;

c. Reinstatement of personal leave used in September, 1987;

d. Such additional pay at the rate of \$1,032.00 per month from the date of submission of these proposed findings and conclusions and continued accrual of personal leave days at the rate of one and a half days until Complainant, Michael Bulka, is reinstated by Respondent, Harrison County School Board;

e. Interest on the amounts of back pay at the rate of 10% per annum until the orther is complied with;

f. \$2,500.00 for other economic damage, humiliation, emotional distress, embarrassment, and loss of personhood and dignity;

g. Payment of medical expenses in the amount of \$765.00;

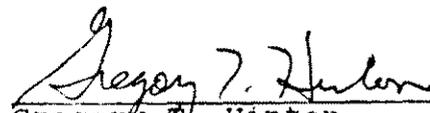
h. Reasonable attorney's fees of \$21,757.75 (\$125.00 per hour for 139.25 hours, plus 25% "lode star"), expenses and costs of \$2,071.11; and

i. An injunction against further discriminatory action by Respondent or any representative or respondent directed toward Complainant, Michael Bulka.

DETERMINATION

This Hearing Examiner, therefore, determines that the Respondent engaged in unlawful discriminatory practices in that the basis for Respondent's action was the handicap condition and sex (male) of the Complainant.

Date this 26th day of March, 1990.



Gregory T. Hinton
Hearing Examiner

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

MICHAEL J. BULKA,

Complainant,

V.

DOCKET NO: EH-214-88

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

O R D E R

Gregory T. Hinton, Hearing Examiner in the above-styled matter, pursuant to public hearing held upon the same, and the filing, by the Hearing Examiner, of Findings of Fact and Conclusions of Law, as well as his Determination based upon said Findings of Fact and Conclusions of Law, does hereby recommend that the Commission take the following action:

1. The Respondent, Harrison County Board of Education, be permanently ORDERED to cease and desist from engaging in any action which deny the rights of employment to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap.

2. Complainant be awarded compensatory damages in the amount of:

a. Immediate reinstatement as a teachers aide in the Adamston Elementary School EMI classroom by Respondent, Harrison County School Board;

b. Back pay in the amount of \$17,344.00 (\$1,012.00 + 1032 X 7 months) plus reinstatement of leave in the amount of six

days of personal leave without cause and nineteen days personal leave;

c. Reinstatement of personal leave used in September, 1987;

d. Such additional pay at the rate of \$1,032.00 per month from the date of submission of these proposed findings and conclusions and continued accrual of personal leave days at the rate of one and a half days until Complainant, Michael Bulka, is reinstated by Respondent, Harrison County School Board;

e. Interest on the amounts of back pay at the rate of 10% per annum until the order is complied with;

f. \$2,500.00 for other economic damage, humiliation, emotional distress, embarrassment, and loss of personhood and dignity;

g. Payment of medical expenses in the amount of \$765.00;

h. Reasonable attorney's fees of \$21,757.75 (\$125.00 per hour for 139.25 hours, plus 25% "lode star"), expenses and costs of \$2,071.11; and

i. An injunction against further discriminatory action by Respondent or any representative or respondent directed toward Complainant, Michael Bulka.

3. The Respondent shall comply with the Commission's Order within thirty (30) day from the date of entry.

It is so ORDERED this _____ day of _____, 1990.

Chairperson, West Virginia
Human Rights Commission