



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400**

**GASTON CAPERTON
GOVERNOR**

TELEPHONE 304-348-2616

**Quewanncoi C. Stephens
Executive Director**

May 9, 1990

Robert E. Barrett
Rt. 1, Box 10
St. Marys, WV 26170

WV Alcohol Beverage
Control Commission
310 57th St.
Charleston, WV 25314

Jan Fox, Asst. Attorney General
Office of Attorney General
Bldg. 1, Room E-26
Charleston, WV 25305

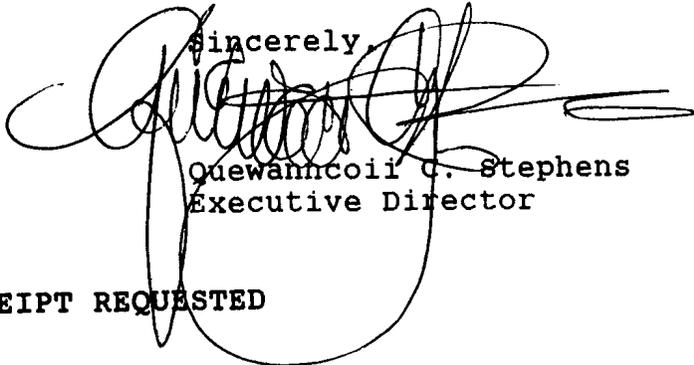
Mike Kelly
Deputy Attorney General
L & S Bldg. - 5th Floor
812 Quarrier St.
Charleston, WV 25301

Re: Barrett v. WV ABCC
EH-229-87

Dear Parties:

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 with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,



Quewanncoi C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERT E. BARRETT,

Complainant,

v.

DOCKET NO. EH-229-87

WEST VIRGINIA ALCOHOL
BEVERAGE CONTROL COMMISSION,

Respondent.

FINAL ORDER

On 14 March 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 Theodore R. Dues, Jr. After consideration of the aforementioned, and after a thorough review of the transcript of record, the arguments and briefs of counsel, and all exceptions filed in response to the hearing examiner's proposed decision, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, with no modifications.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that the complaint filed in this matter by Robert E. Barrett against the West Virginia Alcohol Beverage Control Commission be, and the same is hereby, dismissed with prejudice. The Examiner's recommended findings of fact and conclusions of law

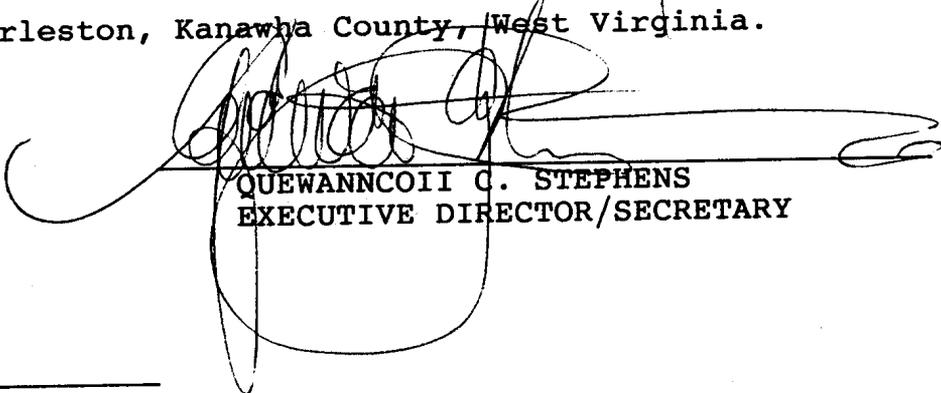
are to be attached hereto and made a part of this Final Order.*

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 the State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the West Virginia 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 30th day of March, 1990, in Charleston, Kanawha County, West Virginia.


QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY

*Even if the hearing examiner had reached a different conclusion, the Commission notes the extreme likelihood that it would, as a matter of law, have been required to enter judgment for respondent on the basis of Chico Dairy Stores, Inc. v. West Virginia Human Rights Commission, 382 S.E.2d 75 (1989).

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERT E. BARRETT,

Complainant,

v.

WEST VIRGINIA ALCOHOL
BEVERAGE CONTROL COMMISSION

Respondent.

Docket No. EH-229-8 W.V. HUMAN RIGHTS COMM.

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**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 8th day of June, 1988. The hearing was held in the fourth floor conference room of the Daniel Boone Building, 405 Capitol Street, Charleston, West Virginia. The Hearing Examiner was Theodore R. Dues, Jr. The Complainant appeared in person and by his attorney Sharon M. Mullens. The Respondent appeared by Lynn Shillings and by its counsel, Jan L. Fox. The presence of a hearing Commissioner had been previously waived by the parties.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent

to the findings and conclusions, the same are rejected.

ISSUES

1. Whether the Respondent unlawfully discriminated against the Complainant, as a result of a legally recognized handicap, in its determination to cancel his appointment to permanent employment, after the Complainant failed to report to work on his original appointment date?

2. If so, to what relief is the Complainant entitled?

FINDINGS OF FACT

1. At the time of the hearing, the Complainant was forty-four (44) years of age.

2. The Complainant was employed with the Respondent as a cashier sometime during the last of April, 1986, at its St. Mary's store.

3. The responsibilities of this position were to sell and stock liquor, operate the cash register and to maintain the cleanliness of the store.

4. This initial appointment was a ninety (90) day appointment which provided for a salary of Seven Hundred Fifty One Dollars (\$751.00) per month and resulted in the Complainant's classification to be that of a temporary employee.

5. The Complainant missed no work during this ninety (90) day appointment.

6. After the ninety (90) day appointment had expired, the Complainant received a thirty (30) day appointment at the

continued rate of pay of Seven Hundred Fifty One Dollars (\$751.00) per month.

7. While away from work on September 19, 1986, the Complainant took ill.

8. On September 20, 1986, the Complainant's supervisor called and requested the Complainant come to work. The Complainant agreed, reported to work and completed the entire shift; notwithstanding the fact that it was to be his day off.

9. On September 21, 1986, the Complainant was hospitalized. Later that day he was sent home but ordered back the next day for tests.

10. The Complainant's wife called his supervisor to report that he would not be able to work due to the required medical tests.

11. On September 22, 1986, the Complainant had the medical tests performed and was advised on the 23rd by his medical specialist, that he had suffered a stroke on the 19th.

12. The pains realized on the 19th was reported to have been the first time that the Complainant had realized such symptoms.

13. On September 23, 1986, the Complainant advised the Respondent of his medical condition. The Complainant was initially told that he may have to be terminated. His supervisor called him and requested that he bring a medical statement to work with him when he returned. Within minutes later, the supervisor called again and advised that the statement would not be needed. Later that evening, the Complainant was called by his

supervisor and was told that he had been terminated. During one of the previous conversations, the Complainant had indicated to his supervisor that he did not know if he would be able to return to work.

14. Subsequent to that, the Complainant made a call to his supervisor and requested a reason for his termination and the supervisor was unable to advise him.

15. On September 24, 1986, the Complainant took an ultrasound which was reported as normal and the physician gave the Complainant a release the same afternoon to return to work.

16. On September 25, 1986, pursuant to the rules and regulations applicable to his appointments, the Complainant's thirty (30) day appointment had expired.

17. Because the Respondent could not appoint the Complainant on September 22, 1986, the September 24, 1986 letter effectively terminated the Complainant on September 25, 1986; which was, as previously mentioned, the final day of Complainant's thirty (30) day appointment.

18. The decision to cancel the Complainant's appointment as a full time employee was processed through and approved by the Civil Service Commission, as per the applicable Civil Service regulations in effect, at the time.

19. If the Complainant had provided notice to the Respondent that he was capable of returning to work within the several days, that he in fact was provided a release from his physician, an accomodation could have been provided under the Civil Service provisions, then in effect. The Complainant never

notified the Respondent that he was capable of reporting to work as per his doctor's decision of September 24, 1986.

20. Had the Complainant reported that he was capable of returning to work within two and one half months of his permanent appointment, the Civil Service regulations would have provided that his appointment could have been amended to accomodate him. This type of amendment is routine with the mechanics of permanent placement within the Civil Service.

21. On November, 11, 1986, the Complainant had been reinstated to the Civil Service register. The Complainant was number four (4) of the top five (5) for the position vacant with the Respondent. The employee actually hired by the Respondent was number two (2) on that list.

22. During the time relevant to this charge, it was the general policy that the employee had the responsibility to advise the agency when he or she was capable of reporting to work, if an amended date was to be requested by the agency.

23. An agency which deviated from the Civil Service regulations in making its appointment subjects itself to penalties and criminal charges under the West Virginia Code, as amended.

DISCUSSION

It is without question that the Complainant is not a handicapped person within the meaning of the West Virginia Human Rights Act. Specifically, the Complainant failed to establish that he suffered from a physical condition which substantially

limited a major life activity over a substantial period of time. West Virginia Code Section 5-11-9(a), as amended.

Further, the Complainant failed to establish a prima facie case of discrimination as the result of a perceived handicap by his failure to establish that the cancellation of his permanent employment was motivated by his perceived physical impairment, as opposed to, his own conduct by failing to indicate when he could return to work; more specifically, by indicating that he was unaware as to when, if at all, he could return to work. In addition to his failure to contact the agency upon his being advised by his physician that he was being released to return to work, the credible evidence of record establishes that the reason for the cancellation of the Complainant's permanent appointment, was due to his failure to report to work on the first day of that appointment. Notice of his availability, to the Respondent, would have afforded the Respondent the ability to request an amendment from the West Virginia Civil Service Commission to accomodate the Complainant. West Virginia Civil Service Regulation 10.02. The Examiner finds no reason to discredit this proposition; under such circumstances, it is generally accepted that the interpretation of statutes by bodies charged with the administration of the same are given great weight unless the interpretation is clearly erroneous. Dillon v. Board of Education of Mingo County, 301 S.E. 2d 588 (1983); Security National Bank and Trust Company v. W.Va. Bancorp, Inc., 277 S.E. 2d 613 (1981).

CONCLUSIONS OF LAW

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

2. The Complainant has failed to establish a prima facie case of either handicap discrimination or discrimination by the Respondent against him based upon a perceived handicap.

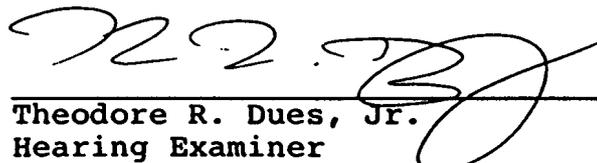
3. Accordingly, the Complainant has failed to establish by a preponderance of evidence that the Respondent discriminated against him either on the basis of a legally recognized handicap, or, on the basis of a perceived handicap in its decision to cancel his permanent appointment.

PROPOSED ORDER

Accordingly, the Examiner does hereby recommend to the Commission that judgement be awarded to the Respondent and that the Complainant take naught for his complaint.

DATED: Oct. 28, 1988

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner