



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**Quewanncoi C. Stephens
Executive Director**

**CERTIFIED MAIL
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November 6, 1991

Lacy E. Childress
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Mingo County Commission
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Asst. Prosecuting Attorney
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Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
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Re: Childress v. Mingo County Commission
ER-129-89

Dear Parties:

Enclosed, please find the final decision of Allan N. Karlin, Hearing Examiner pro tempore, 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 appellant 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;

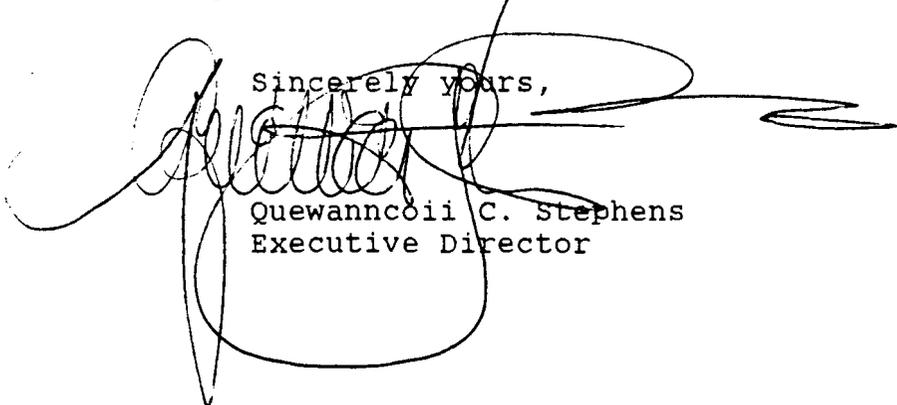
10.8.4. Supported by substantial evidence on the whole record; or

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,



Quewanncoii C. Stephens
Executive Director

QCS/GSG/mst

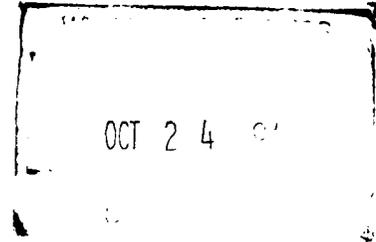
Enclosure

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LACY CHILDRESS,)
)
 Complainant,)
)
 vs.)
)
 MINGO COUNTY COMMISSION,)
)
 Respondent.)

COMPLAINT NO. ER-129-89



FINAL ORDER

This matter matured for public hearing on the 21st day of February, 1991. The hearing was held at the Mingo County Courthouse, Williamson, Mingo County, West Virginia, before Allan N. Karlin, Hearing Examiner *pro tempore*.

The complainant, Lacy E. Childress appeared in person. The West Virginia Human Rights Commission was represented by its counsel, Deputy Attorney General Mike Kelly.¹ The respondent, Mingo County Commission (hereinafter, the County), was represented by Assistant Prosecuting Attorney William Duty.

After a review of the record, including all exhibits admitted into evidence and the view taken of the jail kitchen area, conducted pursuant to the agreement of counsel for the parties, and after an assessment of the credibility of the

¹ Although the Human Rights Commission is a party to this case and pursued the case on behalf of Lacy Childress, the decision will refer to Ms. Childress, rather than to the Commission in discussing the parties.

witnesses and a weighing of the evidence, the Hearing Examiner makes the following Findings of Fact and Conclusions of Law. To the extent that these Findings and Conclusions are generally consistent with any proposed Findings of Fact and Conclusions of Law submitted by the parties, the same are adopted, and, conversely, proposed Findings of Fact and Conclusions of Law which are inconsistent with the Findings and Conclusions herein are rejected.

FINDINGS OF FACT

1. The complainant, Lacy E. Childress, was, at all times relevant to this action, a black female and a resident and citizen of the State of West Virginia.

2. The respondent, Mingo County Commission (hereinafter "County") is an employer as that term is defined by West Virginia Code § 5-11-3(d).

3. On or about August 1988, the County failed to hire Ms. Childress for a position as a cook for the Mingo County Jail.

4. On or about October 13, 1988, Lacy Childress filed a verified complaint with the West Virginia Human Rights Commission, charging the County with unlawful discrimination on the basis of race, in violation of the West Virginia Human Rights Act (hereinafter the "Act"), and, specifically, West Virginia Code § 5-11-9(a)(1). Thereafter, the County denied, in writing, that it had violated the Act and contended that Ms.

Childress had not been hired because of poor performance when she had worked for the County at an earlier time.

5. Ms. Childress, age 31 at the time of the events in question, is a graduate of Williamson High School and has an associate degree in criminal justice from Southern West Virginia Community College, where she has also taken business classes.

6. Ms. Childress had a number of years of experience in the food industry, primarily at fast food restaurants, such as Long John Silver's, Giovanni's Pizza, Chuckie Cheese Pizza, and Little Venice Pizza. At the time of the hearing, she was working as a teacher's aide with the local Head Start program.

7. In November, 1987, the County had a sudden and immediate need for a cook due to a vacancy created by the suspension of one of its cooks.

8. Ms. Childress' uncle, Arthur Childress, who was employed as a janitor by the County, learned of the vacancy and advised his niece that she should see the County's Administrative Assistant, Linda Lynhart² about the position. Lacy Childress then met with Lynhart and was advised of the vacancy. Lynhart further advised her that if she did well, the position could lead to a permanent job. Lynhart, acknowledged that Ms. Childress was hired because the County " . . . needed

² Linda Lynhart is the same person as Linda Smallwood whose deposition is Joint Exhibit No. 1. Her name is also spelled "Linhart" in some places. In the decision, she will be referred to as "Lynhart."

someone right then, because you have three meals a day and the snacks that you have to feed in jail and so forth." She stated that no one else was considered for the position because there was insufficient time to search and there was a need for a cook by the next morning. Ms. Lynhart corroborated Ms. Childress' testimony as to how she got the job and acknowledged that she had told Ms. Childress that, if a permanent position came open, she would be hired "if she worked out."

9. Lacy Childress started her work as a jail cook in November 1987, prior to Thanksgiving. The evidence is in conflict as to when Ms. Childress started her employment at the jail. Ms. Childress testified that she prepared Thanksgiving dinner at the jail. The weight of the evidence supports her testimony and supports the conclusion that she started work as a jail cook on or before November 19, 1987, prior to the formal job description set forth in Joint Exhibit No. 3. In fact, Joint Exhibit No. 3 specifically indicates that Ms. Childress was to assume the duties of the "Jail Cook .. as designated in the job description 'Cook' previously filed in the Commission [County] record book on November 19, 1987 and attached hereto." Joint Exhibit 3, emphasis added. The Job Description, Exhibit No. 4, designates Lacy Childress as a "Temporary." Since that job description was filed on November 19, 1987, Ms. Childress must already have been employed on or about that date.

10. Although Joint Exhibit No. 3 sets forth an agreement that was only for a period of fifteen (15) days, Ms.

Childress actually continued working for the County until late March or early April, 1988. During her work as a cook for the County, Lacy Childress was paid a wage of \$5.00 per hour for cooking, and overseeing the service of, three meals per day; cleaning all dishes and utensils; sweeping and mopping the floors and wiping down the walls; and making the necessary preparations for the next day's meals. Due to security concerns, she sometimes was required to stay at the jail from 4:30 a.m. to 6:00 p.m.

11. Although the County introduced some testimony and records that suggested that Ms. Childress had worked less than she testified, the County Administrative Assistant, Lynhart, admitted that, for some period of time, when both of the other cooks were on leave, Lacy Childress worked seven (7) days per week and approximately thirteen (13) hours per day. As Ms. Lynhart admitted:

Q. [Mr. Kelly]: Now, to the best of your memory, isn't it true that Miss Childers (sic) at times was working seven days a week, that she was the only employed cook?

A. [Linda Lynhart]: That was at her option, but she was paid.

Q. She was working every day?

A. Yeah, but that was when we were trying to find another cook. It was hard to find another cook.

Q. So, she was working about a 13 - hour day?

A. Right, she was there 13 hours.

Deposition of Linda Lynhart, August 13,
1990, pages 18, 19.

12. Thus, although Ms. Childress' exact starting date and the number of hours she worked are uncertain, the County's records are not reliable and Ms. Childress worked more often than the County contends, although the exact number of days cannot be determined.

13. Childress worked as a cook at the jail until late March or early April, 1988, when Tiller returned.

14. In June, 1988, the County hired a white person, Deanna Collins, for the position of cook on a temporary basis. In August, 1988, Ms. Collins became a permanent employee as cook at the jail.

15. At the time that the County hired Ms. Collins for temporary and permanent positions, Lacy Childress had an active application for employment pending with the County.

16. The reasons given by the County for not hiring Lacy Childress as a cook are pretextual and not worthy of belief.

17. The County intentionally discriminated against Lacy Childress because of her race, in violation of West Virginia Code § 5-11-9, and is liable to her for her economic loss and such other relief as allowed by law.

18. The allegations against Ms. Childress are not credible. They appear to be the type of unsubstantiated, post hoc, charges that are made up to defend against a discrimina-

tion charge. The complete absence of any contemporaneous documentation and the general vagueness of many of the County's complaints suggests that they were created in defense of this claim or, at best, that they are exaggerations of minor matters that were not considered important at the time.

19. The complaints of the County and, in particular, of County Administrative Assistant Lynhart about Childress' work, are not credible. Many of those complaints allegedly came through Jeanne Goan who did not testify. The alleged complaints lacked detail and corroboration and were without any substantial documentation. Deanna Collins, the white person who was later hired for the job, admitted that everyone gets complaints about the food. Notably, Ms. Collins was never disciplined for the complaints about her.

20. Lacy Childress credibly testified that during her four months of responsibility as a jail cook, the only complaints she received involved a complaint from an inmate that his pancakes were too thin and a complaint from a guard when she started serving vegetables as a side dish to accommodate a vegetarian prisoner who wanted the meat and vegetables separated. These complaints did not come from Lynhart who never complained to Childress about any issues involving her cooking.

21. Lynhart's claim that she caught Childress sleeping in the cot, located near the cooking area, when she should have been working is not credible. Childress' denial is

supported by other evidence. County witness Kathy Blackwell admitted that Lynhart had not been in the jail often during her many years of service. While Ms. Childress may have laid down on the cot, Lynhart acknowledged that Childress could do so if she was on her break. In fact, other cooks engaged in similar behavior. While Childress may have lay down briefly during breaks in her day, it is extremely unlikely that she would have allowed herself to fall asleep in the jail environment. In addition, Lynhart's testimony was equivocal, at best, since she admitted that she did not even "recall if she [Childress] was asleep all three times or not. . . ." ³ The Hearing Examiner concludes that the testimony about Childress sleeping during work time is not credible.

22. The "wine bottle incident" was not properly attributed to Ms. Childress. On January 3, 1991, a bottle of wine was found in one of the large refrigerators in the jail's kitchen area. Ms. Childress denied that she was responsible for that bottle. At the time, the County does not even appear to have concluded that Childress had brought wine into the jail. Thus, the reference to the wine seems an after the fact attempt to justify a discriminatory hiring decision. Although Lynhart contended that Childress had exclusive control of the area, the County's own witnesses supported the complainant's credible assertion that others had access to the refrigerator. Officers Blackwell and Justice admitted that, at the time of

³ Deposition, Linda Smallwood (Lynhart), page 23.

the wine bottle incident, the area was not locked and officers, among others, had easy access to the refrigerators. Neither the incident report filed at the time,⁴ nor the testimony of any other witness supported the County's attempt to use this incident as an excuse for their subsequent failure to hire Ms. Childress as a permanent cook.

23. Respondent points to alleged discrepancies in Ms. Childress' testimony about being searched and the number of hours she worked. For reasons discussed in greater detail *infra*, the Hearing Examiner finds that Ms. Childress is credible. While there may have been some inconsistencies in her testimony, credibility does not turn on any one issue in the case. Rather, credibility turns on the general credibility of the witness in light of her demeanor and of the record as a whole. The Hearing Examiner finds that her demeanor and the record as a whole support his conclusion and that any discrepancies do not detract from Childress' credibility on the major issues in the case. For example, with regard to the wine bottle incident, her confusion about whether she was searched before or after the wine bottle incident is understandable given the passage of time. Given the findings and discussions in paragraph 22 above, it is apparent that the County's attempt to blame the "wine bottle" incident on Ms. Childress is not credible with or without her confusion as to when she was first searched. Moreover, as to the number of hours Ms. Childress

⁴ Respondent's Exhibit No. 3.

worked, there are discrepancies in the county's own evidence on this issue. Thus, the Examiner draws no inference against Ms. Childress from the testimony and evidence on these issues.

24. Ms. Childress did not fail to keep the kitchen clean. There were some unsubstantiated allegations that Childress did not keep the kitchen clean. As with other issues, there was no documentation or corroboration of the charge and no evidence that Ms. Childress was any different from other cooks.

25. Deanna Collins' earned income is as follows:

<u>Time Period</u>	<u>Salary Per Month</u>
August 1988 thru December 1988	\$ 900
January 1989 thru June 1989	\$1,000
July 1989 thru December 1990	\$1,015
January 1991 to present	\$1,050

26. Complainant's earnings history since April 1988 is as follows:

<u>Time Period</u>	<u>Salary Per Month</u>
April 1988 thru December 1989	\$ 0
January 1990 thru May 1990	\$3,050
June 1990	\$ 610
June 1990 to present	\$ 0

27. Since November 1990, complainant has worked as an unpaid teacher's aid in return for public assistance, food stamps and health care coverage.

28. Using Deanna Collins as a comparison, back pay due complainant is calculated as follows:

<u>Time Period</u>	<u>Earnings</u>
August 1988 thru December 1989	\$16,590
January 1990 thru May 1990	\$ 1,950
June 1990	\$ 390
July 1990 to February 28, 1991	<u>\$ 9,240</u>
TOTAL	\$28,170

29. There is insufficient evidence to calculate the value of lost benefits and annual leave. In fact, the Examiner concludes that Ms. Childress would have used any annual leave that she would have accrued.

30. Respondent offered no evidence that complainant had unreasonably failed to mitigate her damages.

31. As a result of respondent's discriminatory conduct, complainant suffered some emotional distress, humiliation and loss of personal dignity, but the value of economic loss is sufficiently high that it adequately compensates Ms. Childress for any emotional distress which she suffered in this case.

ISSUES

1. Whether the County intentionally discriminated against Lacy Childress because of her race when it failed to hire her for a position as a permanent cook at the Mingo County Jail?

2. If so, to what relief is Lacy Childress entitled?

DISCUSSION

A. Introduction.

A claimant who contends that she has been the victim of employment discrimination based upon her race must bear the initial burden of establishing a *prima facie* case. If the complainant Childress makes out her *prima facie* case, then respondent is required to come forward and state a legitimate, non-discriminatory reason for its hiring decision. Once the employer does so, then the complainant must show that the proffered reason is pretextual. *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, W.Va., 309 S.E.2d 341 (W.Va. 1983).

B. Lacy Childress Established a Prima Facie Case.

In the present case, Lacy Childress must meet her *prima facie* case by proof that (1) she belongs to a protected group, (2) she applied for and was qualified for the position of jail cook, (3) she was rejected despite her qualifications, and (4) after the rejection the County continued to accept applications of similarly qualified persons. *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, *supra*, Syllabus Point 8.

Ms. Childress has met her burden of proof. First, as a black person, she is a member of a group protected from discrimination under the West Virginia Human Rights Act.

Second, from the testimony of Linda Lynhart, it is also clear that Ms. Childress applied for the job. Lynhart

told Childress that, if a permanent position opened, she would be hired "if she worked out. . . ." ⁵ Between April and August, 1988, Childress came to see Lynhart "several times," but Lynhart told her that there was no opening. ⁶ Ms. Childress did file an application although the County could not locate it at the time of the hearing. Moreover, Section 6b of the Mingo County Commission "Personnel Policy" specifically states that "[a]pplications for employment shall be active for a period of one year." ⁷ Thus, it is apparent that Ms. Childress did everything necessary to ensure that she was considered for a permanent jail cook position and should have been considered an active applicant to and through the time that Deanna Collins was hired.

Third, Ms. Childress was qualified for the position. She had worked a number of years in the food industry and had already worked as a temporary jail cook. Even County Administrative Assistant Lynhart admits to an initial impression that Ms. Childress was doing a "terrific job."

Fourth, Ms. Childress was rejected for permanent employment despite her qualifications.

Finally, although Ms. Childress was qualified, a new application was taken from Deanna Collins and Ms. Collins was hired as a temporary and, later, as a permanent cook.

⁵ Joint Exhibit No. 1, p. 6.

⁶ *Id.*, pages 31-32.

⁷ Respondent's Exhibit no. 1, page 3.

Thus, Ms. Childress has established her *prima facie* case.

C. The Mingo County Commission's Alleged Non-Discriminatory Reason for Failing to Hire Lacy Childress is Pretextual.

Once a complainant establishes a *prima facie* case of discrimination, the burden shifts to the respondent to come forward with a legitimate, non-discriminatory reason for its employment decision. The County contends that it did introduce legitimate, non-discriminatory reasons for its employment decision. In particular, the County argues that Ms. Childress was not rehired because her work performance had been unsatisfactory during her initial period of employment.

After carefully considering all of the evidence, the Hearing Examiner concludes that the County's alleged non-discriminatory reason is pretextual. Contrary to the County's assertion, Ms. Childress' attack on the County's alleged reason is not just based on her own denial of its allegations. While her testimony was credible and relevant, the Hearing Examiner did not rely on her testimony alone. Rather, inconsistencies and problems with the County's own evidence, as well as the overall credibility of Ms. Childress, lead the Examiner to reject the County's contentions.

First, the Hearing Examiner is disturbed by the shifting nature of the County's allegations against Ms. Childress in its defense of this case. For example, the County raised the so-called "wine bottle" incident as evidence against

Ms. Childress and suggested that she was responsible for bringing the wine bottle into the jail. In its answers to the Commission's First Interrogatories, Interrogatory No. 12, the County stated that "statements of inmates, trustees, and others" led it to conclude that Ms. Childress had brought a wine bottle into the jail.⁸ (Commission Exhibit No. 12). Yet, at the time of the "wine bottle incident," in January, 1988, there was no serious allegation that Ms. Childress was responsible for the incident. In fact, she was allowed to continue working at the jail without any serious attempt to blame her for the presence of the wine bottle in the refrigerator. Moreover, Lynhart admitted that she did not claim that Lacy E. Childress had placed the wine bottle in the refrigerator.⁹ Thus, at the time that the wine bottle was found in the kitchen, the incident was not treated as a reason to take action against Childress. The attempt to rely on that incident to justify the subsequent decision to reject her for employment is not credible. It is also unfair to Ms. Childress.

Second, in light of the performance of the other cooks who were working at the jail prior to and during the time that Lacy Childress worked there, the alleged concern about Ms. Childress' conduct is difficult to take seriously. For

⁸ See, Answer to Commission's First Interrogatories, No. 12 at Page 3 of Part 2 of Commission Exhibit No. 1.

⁹ *Id.*, p. 27, lines 13-21.

example, according to County witness Lynhart, B. I. Tiller, a white male

" . wouldn't cook the food thoroughly, wouldn't clean the kitchen, was allowing the trustees to do the work, was sleeping on the cot, would go into the kitchen without a shirt, wouldn't wear his cap or hair net and even served tainted food to the inmates."¹⁰

Although Tiller's performance was apparently worse than abysmal, he was retained until he retired in 1988.¹¹ In light of the Respondent's toleration of Tiller's behavior, its alleged concern about Ms. Childress' behavior is disingenuous.

Third, the County provided absolutely no written documentation that the alleged deficiencies in her performance were called to the attention of Childress while she worked for the County. Had the concerns been as serious as the County now claims, one would expect to find some documentation. This is particularly true in light of the extensive "Personnel Policy" adopted by the County. Respondent's Exhibit No. 1.

Moreover, in addition to a lack of written documentation of the alleged problems with Childress, the County's allegations are difficult to accept because it did little to call those so-called problems to Ms. Childress' attention when she was an employee. Linda Lynhart, who testified on behalf of the County and who was responsible for the employment of Lacy E. Childress, testified that she never

¹⁰ *Id.*, p. 13, lines 5-14; p. 14, lines 17-18.

¹¹ *Id.* p. 14, lines 22-23.

even spoke to Lacy E. Childress about some of the alleged problems. Human Rights Commission attorney Mike Kelly asked Ms. Lynhart:

Q. Did you ever speak with her [Lacy Childress] when these problems were addressed to you? Did you ever speak to Ms. Childress?

A. No sir.¹²

Although Ms. Lynhart subsequently changed her testimony and suggested that she talked to Lacy E. Childress "twice," it appears that the discussions were about things like putting too much garlic or spice in the food.¹³ Even if such discussions occurred, it is difficult to consider the "garlic and spice" offenses to be significant deficiencies in her performance. At worst, they required a slight alteration in culinary technique of far less significance than the problems that resulted when co-worker Tiller served the inmates spoiled food.

Fourth, some of the alleged complaints appear trivial. Lynhart contended that Ms. Childress used too much

¹² Deposition of Linda Smallwood, p. 21, lines 7-10.

¹³ *Id.*, p. 22, lines 3-6. Smallwood's testimony is inconsistent and not credible. First, she said she had not spoken with Ms. Childress about her complaints. Page, 21. Then, she said she spoke to her twice about using too much garlic or spices. Page 21-22. While Smallwood contended that Childress slept on the job, she admitted telling Childress that she could take a nap on the cot if she was on her break. Page 23. Smallwood contended that she did not talk to Childress about this at the time because inmates were present, but it is unclear if these alleged talks occurred at the same time as the "garlic and spice" talks or not. In any case, no documentation was made of any of these alleged conversations and the Hearing Examiner does not believe that Smallwood ever really gave Ms. Childress any notice that her performance was unsatisfactory while she was working there.

spices and garlic. Yet, the cook hired instead of Ms. Childress, Deanna Collins, testified that

Everybody gets complaints up there. No matter what you give them, they're never satisfied. You'd think that was the Ritz up there. (Tr. 207)

Collins was apparently never disciplined for these "complaints." Under the circumstances, the alleged concern for Childress' garlic and spices, even if true, cannot be taken seriously as a reason to reject her for permanent employment.

With regard to allegedly sleeping on the job, Lynhart admitted that Childress was permitted to rest on the cot during breaks. The allegations that Childress actually slept during work in the presence of numerous male prisoners is not credible in light of Ms. Childress' testimony, the absence of any documentation of the incidents, the improbability of Ms. Childress sleeping in the presence of male prisoners, and the fact that the County's own witness, Cathy Blackwell, admitted that Lynhart was not in the jail very often¹⁴.

Fifth, according to the County's response to the Commission's Interrogatory Number 11, the primary source of complaints against Ms. Childress was Jeanne Goan.¹⁵ Yet, Lynhart acknowledged that Goan was fired by the Sheriff.¹⁶

¹⁴ Deposition, Linda Smallwood (Lynhart), pages 157-158.

¹⁵ Response to Interrogatory No. 11 of the Commission's First Interrogatories, Commission Exhibit No. 1.

¹⁶ Deposition of Linda Smallwood, page 26, lines 6-11.

Under the circumstances, it is difficult to believe that the county put so much weight on the reports of Goan.

Finally, Childress' testimony was credible. Contrary to the County's argument, Ms. Childress was a credible witness. Her testimony was more consistent with the other facts and evidence of record than that presented by County witnesses. For example, the county points to inconsistencies between its limited work records and Ms. Childress' testimony. As discussed, *supra*, her recollection of when she started and how much she worked is consistent with Lynhart's testimony and with Joint Exhibit Nos. 3-4.

The County also argues that Childress was not a credible witness because she changed her testimony about being searched at the jail. She first testified that she was searched before she went to work in the kitchen every day. (Tr. 34). Later she testified that the searches started after the January, 1990 wine bottle incident. Yet, this discrepancy does not undermine her credibility in the case as a whole. Any discrepancy over when she was searched may have resulted from the passage of time between January, 1988, and the hearing in 1991. Most important, credibility rarely turns on a single isolated piece of testimony. In the difficult atmosphere of a hearing, witnesses often do present some inconsistency in their testimony due to confusion, the passage of time, or other factors. The issue is the overall credibility of the witness on the record as a whole. A conclusion about credibility is

based upon the totality of the circumstances, the witness' demeanor, including eye contact in responding to questions from counsel and the Hearing Examiner, the plausibility of her testimony, her attitude, and the overall consistency of her testimony with the evidence and inferences in the record as a whole. In this case, all of those factors lead the Hearing Examiner to conclude that the testimony of Lacy Childress about her work as a jail cook, the failure of the County to call any substantial criticisms to her attention, her innocence in the "wine bottle incident" and the overall adequacy of her performance are credible and should be believed.

In conclusion, it appears that the County was prepared to hire Ms. Childress as a temporary employee when it was desperate and needed someone immediately. Given time, however, it preferred to hire a white person for the permanent job. On this record, the Hearing Examiner must conclude that the allegations of poor performance are pretextual.

CONCLUSIONS OF LAW

1. Lacy Childress, a black person, applied to the Mingo County Commission for a position as a permanent cook and is protected by West Virginia Code § 5-11-1 et seq.
2. The Mingo County Commission is an employer within the meaning of West Virginia Code § 5-11-3(d).
3. Lacy Childress established a *prima facie* case that the Mingo County Commission unlawfully discriminated against her because of her race when it failed to offer her a

position as a permanent cook at the Mingo County Jail between June and August, 1988.

4. Although the Mingo County Commission did proffer alleged nondiscriminatory reasons for its employment decision, Lacy Childress has met her burden of proving, by a preponderance of the evidence, that those reasons are pretextual.

5. Lacy Childress is entitled to receive back pay reflecting her loss of income as a direct and proximate result of the County's unlawful discrimination in the amount of \$28,170.00 through February 28, 1991.

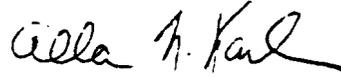
6. The economic loss in this case is sufficiently great that it adequately compensates Lacy Childress for any incidental damages which she might have suffered.

7. Lacy Childress is entitled to prejudgment interest on her lost wages at the statutory rate of ten percent (10%) per annum, to accrue commencing with the last day of each calendar quarter of the back pay period, on the total amount then due and owing.

8. The County is ordered to and must place Lacy Childress in the next available jail cook position.

9. Lacy Childress is entitled to additional wages from March 1, 1991 to and through the date of her placement in the position of jail cook at the jail in the amount of \$1,050.00 per month less any amounts actually earned by Lacy Childress as wages during said period.

10. Respondent is further ordered to cease and desist from unlawfully discriminating on the basis of race in its employment decisions and, pursuant to such cease and desist order, is hereby ordered to advertise in the Williamson Daily News and post in the local state Employment Security office all future openings for the position of jail cook.



ALLAN N. KARLIN
For the West Virginia Human
Rights Commission