



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

GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

March 28, 1990

Nona Carte
P.O. Box 368
Clay, WV 25043

Clay County Commission
P.O. Box 624
Clay, WV 25043

Richard A. Facemire, Esq.
Clay County Courthouse
P.O. Box 25
Clay, WV 25043

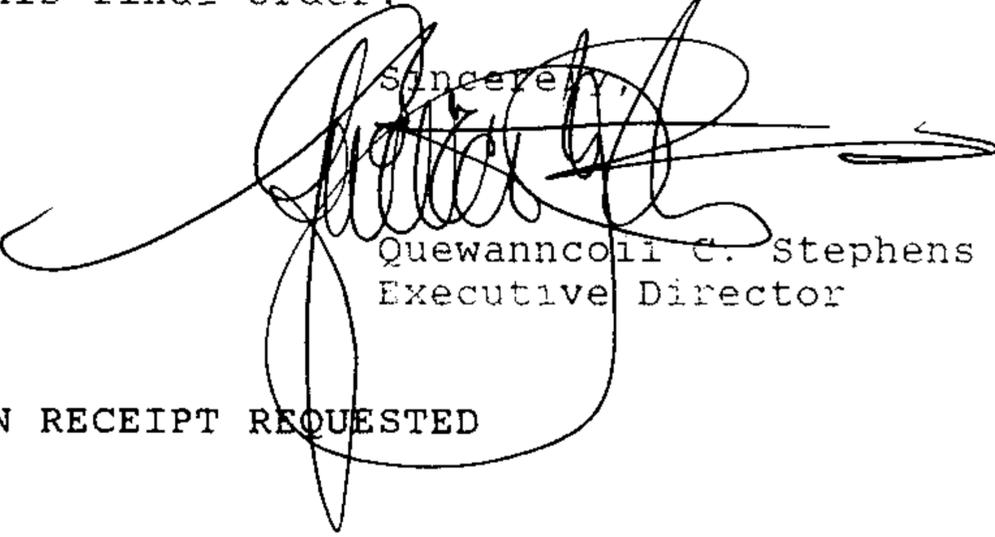
Mike Kelly
Deputy Attorney General
812 Quarrier St.
L & S Bldg. - 5th Floor
Charleston, WV 25301

Re: Carte v. Clay County Commission
EA-239-86

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,


Quewanncoii 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

NONA CARTE,

Complainant,

v.

DOCKET NO. EA-239-86

CLAY COUNTY COMMISSION,

Respondent.

FINAL ORDER

On 2 February 1990 the West Virginia Human Rights Commission reviewed the Recommended Findings of Facts and Conclusions of Law filed in the above-styled matter by hearing examiner, Theodore R. Dues, Jr. After consideration of the aforementioned, and all exceptions filed in response thereto, 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 Nona Carte against the Clay County 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.

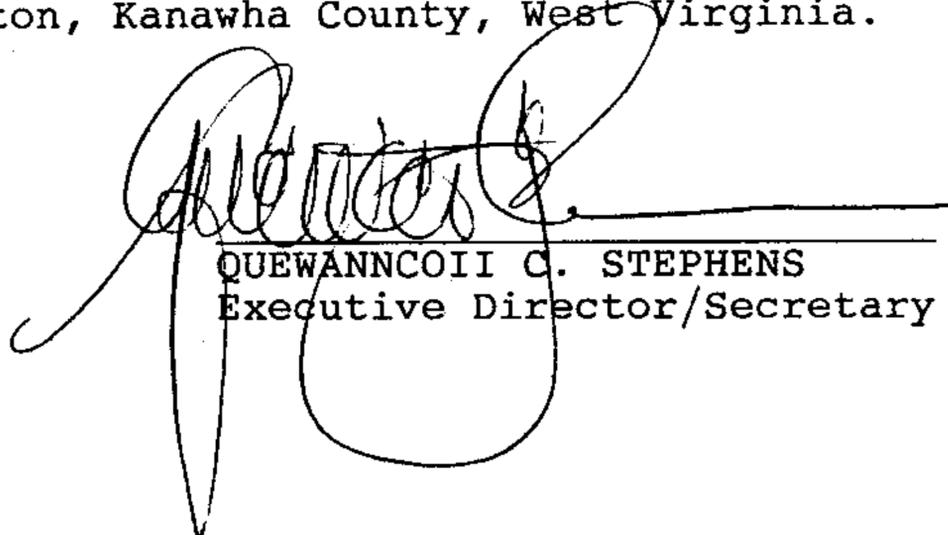
By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and to the Secretary of State of the State of West Virginia, the parties

are hereby notified that they have ten days to request a reconsideration of this Final Order and that they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

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



QUEWANNCOII C. STEPHENS
Executive Director/Secretary

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

NONA CARTE,

Complainant,

v.

CLAY COUNTY COMMISSION,

Respondent.

DOCKET NO: EA-239-86

RECEIVED

MAR 10 1989

WV HUMAN RIGHTS COMM.
Answered _____

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

This matter matured for public hearing on June 24, 1987 and concluded on July 8, 1987. The hearings were held at the Clay County Commission Court Room. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Betty Hamilton, Hearing Commissioner.

The Complainant appeared in person and by her Counsel, Sharon Mullens. The Respondent appeared by its Representative Glada Lanham and by its Counsel, Richard A. Facemire.

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 these findings and conclusions, the same are rejected.

ISSUES

1. Whether the Respondent discriminated against the Complainant because of her age.

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

FINDINGS OF FACT

1. At the time of hearing, the Complainant was 58 years old. She has a fifth grade education.

2. The Complainant was employed with the Respondent from March 1978 to September 30, 1985; at which time she earned Four Dollars Seventy-Five Cents (\$4.75) per hour for a forty hour week.

3. During her tenure, the Complainant was employed as a dispatcher. Until January 1979, the County Commission supervised the Complainant. After that date, the Respondent hired Glada Lanham to be the supervisor of the Ambulance Service.

4. During the Complainant's tenure, there was one dispatcher until September 1981; at which time three others were hired. After they quit; two other dispatchers were hired in their places.

5. The Complainant, and possibly two other

employees of the Ambulance Service, were over the age of 40.

6. As a matter of practice, all employees were allowed to sleep on the midnight shift. However, the understanding was that persons could not sleep while ambulances were on a call.

7. The Complainant, as well as other employees, reported to work late from time to time.

8. The Complainant was the subject of complaints by Glada Lanham, as well as, the topic of conversation between Lanham and her husband pertaining to certain aspects of the Complainant's physique.

9. The Complainant bought her dispatcher patches and her own shirts although everyone else had these items supplied to them. However, the Complainant did not complain about this. On or about July 25, 1985, the Complainant was late reporting to work and admonished for not calling an ambulance driver. She was warned that should these incidences reoccur she would be discharged.

10. The Complainant had received an earlier suspension for 10 days for causing an ambulance to report out 22 minutes late. The suspension was later reduced by the Respondent to 5 days due to perceived ambiguities in the facts leading up to the late call for the ambulance. prior to this, Glada Lanham had the opportunity to inform the Respondent that the Complainant was one of the better employees at the Ambulance Service.

11. Toward the end of Complainant's tenure, she was

late 4 out of 5 shifts. During her tenure, the Complainant was treated no differently in the terms and the conditions of her employment than other employees. The Complainant's overall late arrivals and absences exceeded any other employees for the relevant time period.

12. On or about October 1, 1985, the Complainant was issued a termination notice for unauthorized absences from work and for her failure to adhere to her authorized working hours.

13. During the Complainant's tenure, a male state trooper was hired with the Respondent, with the understanding that if he had to report late to his duties as dispatcher, due to his police duties, he was to call and report the same. The evidence reflects, this occurred on only one occasion.

DISCUSSION

The Complainant met her burden of making a prima facie case by introducing evidence that the Respondent allegedly discriminated against her by terminating her for breaches of the employment policies, for which persons younger, and not in the protected age group, were not disciplined. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area

Mental Health Agency, Inc., 329 S.E. 2d. 77 (1985). The Respondent articulated a legitimate nondiscriminatory reason for its discharge of the Complainant. Specifically, the evidence established that the Complainant reported to work late and was absent far more times than any other employee. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981); Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 352 (1983).

The Complainant attempted to show that the reasons articulated by the Respondent were pretextual and that the Respondent was more likely motivated by an unlawful discriminatory reason, in her discharge; more particularly her age. However, the credible evidence in the case does not justify this conclusion. Although the Complainant was admonished by Glada Lanham for tardiness and there were some disparaging comments made by Glada Lanham and her husband pertaining to Complainant's physique in the Complainant's presence, these matters cannot be determined to be motivated by the Complainant's age. Further, the weight of the credible evidence suggest that the Complainant was in a category alone when reviewing her comparative tardiness and absence from work to that of her coworkers.

CONCLUSIONS OF LAW

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

action.

2. The Complainant met her burden of a prima facie case by introducing evidence that she was a member of the protected class, that she was qualified for the position of dispatcher, that she was admonished for breaches of employment policy and practices when younger employees, not within the protected group, were not admonished.

3. The Respondent articulated a legitimate nondiscriminatory reason for its actions by establishing that the Complainant's tardiness and absences were in excess of any other employees and that she had received a warning and a suspension prior to her termination, for this conduct. The evidence establishes that there were no other employees similarly situated in absences and tardiness.

4. The Complainant failed to establish that the Respondent's articulated reasons were pretext for unlawful age discrimination against her.

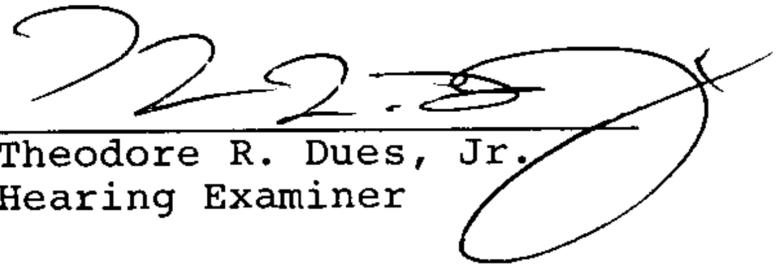
5. Accordingly, the Complainant has failed to meet her burden of proving by a preponderance of the evidence that she was discriminated against by the Respondent because of her age.

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission award judgment for the Respondent.

DATED: February 10, 1989

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

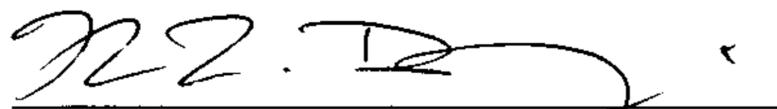
CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, do hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Richard A. Facemire, Esquire
P.O. Box 25
Clay, WV 25043

Sharon Mullens, Esquire
Senior Assistant Attorney General
812 Quarrier Street, 4th Floor
Charleston, WV 25301

by depositing the same in the United States mail postage prepaid on this 10th day of February, 1989.


Theodore R. Dues, Jr.
Hearing Examiner