



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**CERTIFIED MAIL
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January 16, 1998

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Re: Deitz v. WV Dept. of Public Safety/WV State Police Dept.
ES-149-93A

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned 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 administrative law judge'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 judge, 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 administrative law judge shall not operate as a stay of the decision of the administrative law judge 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 administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, 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 administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge'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.

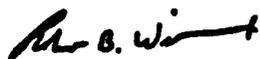
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10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the 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, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHAREN S. DEITZ,

Complainant,

v.

DOCKET NUMBER(S): ES-149-93A

WV DIVISION OF PUBLIC SAFETY/

WV STATE POLICE DEPT.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on July 25, 1996, in Kanawha County, at the Offices of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge. By agreement of the parties, the testimony of Tom Barrick was taken prior to the Public Hearing on July 15, 1996; while the evidentiary telephone deposition of David Roberts was taken on July 16, 1996, and the evidentiary deposition of Robert White was taken February 20, 1997. The transcript in this matter is numbered consecutively beginning with the testimony taken from Tom Barrick on the 15th of July through the Public Hearing conducted on July 25th and 26th; while the deposition

testimony of David Roberts and Robert White are contained in separate transcripts for those evidentiary depositions at Joint Exhibit No. 1 and as a portion of Complainant's Exhibit No. 14, respectively.

The complainant, Sharen S. Deitz, appeared in person and by counsel, Barbara Fleischauer, with Fleischauer & Associates and Webster J. Arceneaux, III, with Lewis, Friedberg, Glasser, Casey & Rollins, LLP. The respondent, West Virginia Division of Public Safety/West Virginia State Police Department, appeared by its representative, Steven W. Cogar, and by counsel, Bradley Deel, Assistant Attorney General. The case was briefed on behalf of respondent by Assistant Attorney General, Delores A. Martin, with the West Virginia Office of the Attorney General.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Complainant, Sharen S. Deitz, is a female resident of West Virginia. Tr. p. 161.

2. Respondent, the West Virginia State Police, part of the West Virginia Department of Public Safety, is and was at all relevant times, a person and an employer, as those terms are defined under W.Va. Code §§ 5-11-3(a) and 5-11-3(d). Tr. p. 493.

3. Complainant began her employment with the respondent on May 16, 1977. Complainant was the first female Trooper in the history of the State. Tr. pp. 157 and 161.

4. Complainant experienced discrimination at the State Police Academy. One of the the instructors referred to her as "it" because he didn't know whether she was a male or a female. While on another occasion, she injured her knee during a training exercises when it caught on the mat; she was given an ace bandage to wrap around it; while, when the exact same injury occurred to a male cadet, an ambulance was summoned to take him immediately to the hospital. Her complaint of injury was not taken as seriously as that of the male cadet, because she was female. Tr. pp. 162 through 164.

5. Complainant graduated from the Police Academy in March 1977 and was initially assigned as a Trooper in the field with Company "B". Complainant was next transferred to Governor's security. From Governor's security, the complainant was transferred to planning and research at headquarters; and then briefly to the field in Company "E"

the turnpike; before being transferred back to headquarters to the criminal records section. Tr. p. 158.

6. When complainant informed superiors that she was pregnant, she was immediately transferred from the Governor's security to planning and research, even though she did not feel that continuing in that capacity would be a problem. Tr. pp. 164-165.

7. When complainant returned from maternity leave, she was transferred effective immediately, again, to the field in Company "E", patrolling the West Virginia Turnpike. When she explained to the then superintendent of the State Police that she could not nurse her baby, who was refusing the bottle and required breast feeding at lunch by order of her doctor, the respondent refused to make accommodations until the Governor intervened and the transfer order was rescinded. Tr. pp. 166-169.

8. Complainant was transferred to the Criminal Records Section on April 15, 1985, and worked in the Criminal Disposition Reporting (CDR) division of Criminal Records until August, 1993. Tr. pp. 159, and 190-191.

9. In 1989, complainant became Director of the CDR division. At the same time SGM was made director of the Uniform Crime Reporting (UCR) division of the Criminal Records section. Tr. pp. 195-196.

10. As director of CDR, complainant performed an enormous amount of training relating to finger print cards and completion of CDR forms. She was certified to teach classes at the State Police Academy; and also taught numerous other groups who worked with these forms, including deputy sheriffs, municipal police officers, corrections officers, under cover Troopers, prosecuting attorney

office personnel, circuit court personnel and magistrate court personnel. Complainant also revised the fingerprint cards and CDR forms. Tr. pp. 198-204.

11. Complainant was certified by the FBI as a fingerprint technician. Tr. p. 209.

12. Complainant received very positive evaluations for this work, with considerable commentary on her teaching, her initiative and her communication skills. Her training efforts with other organizations drew letters of commendation from many of those groups. Complainant's Exhibit No. 6.

13. Although her job title had remained that of Director of CDR at all relevant times; it is clear that by virtue of her rank and time in duty, complainant served in the de facto capacity of assistant director of the Criminal Records section (as SGM had been assigned to Criminal Records in 1987, while complainant had been in duty with Criminal Records since 1985); and in the absence of Lieutenant Atkinson, who was in charge of that section, complainant supervised its 18-20 employees. As director of CDR she directly supervised the civilian clerk assigned to that division on a continuous basis. Tr. pp. 196-197, and 493-495.

14. Mr. Barrick was first hired by the State Police in 1982, five years after complainant. Tr. p. 6.

15. Since Mr. Barrick was hired to be employed in the State Police laboratory, he attended the State Police Academy for a lesser training period of 11 weeks. Tr. p. 9.

16. Between 1982 and 1992, Mr. Barrick worked in the crime laboratory with trace evidence. Tr. p. 10.

16. Prior to May 1992, Mr. Barrick had supervised no employees; had no administrative experience; had no training at the State Police relative to Criminal Disposition Reporting (CDR) forms, finger print training, Uniform Crime Report (UCR); and, did no training at the State Police Academy or anywhere else, relative to the CDR, UCR, or fingerprinting, those being the functions handled by the Criminal Records section. Tr. pp. 27-34.

17. Mr. Barrick's evaluations were generally satisfactory. Mr. Barrick had computer knowledge and generally got involved with computers in the forensics lab and other units at headquarters whenever there were problems with the computers. He had a reputation at headquarters as someone who could deal with computer problems. Tr. pp. 71-71, 95, 99, and 316-318.

18. Lt. Atkinson applied for grants to computerize the Criminal Records section; and noted that Mr. Barrick assisted him in making application for one or more of those grants. Mr. Barrick was assigned to a computer upgrade task force by Major Bias, who headed up the headquarters as officer in charge of support services; and served on that task force with Mr. Barrick and Lt. Atkinson and two other individuals including Dave Roberts, from SEARCH, an organization affiliated with the U.S. Department of Justice as a non profit entity to assist police forces with updating crime record technologies through consulting services. Major Bias had made computerization of the Criminal Records section a part of his five year plan. Tr. pp. 326, 330, and 510-516.

19. Prior to May 1992 complainant had taken introduction to computer classes at her own expense. Complainant tried to keep

abreast of the steps being taken to automate various functions of Criminal Records. Although complainant attended one meeting of the computer task force, she was not informed of subsequent meetings and was not asked to be part of the task force or to participate in the grant writing process. Tr. pp. 211-216.

20. SGM was Uniform Crime Report (UCR) Director and she continuously supervised one employee in that capacity. As she had been assigned to duty in Criminal Records for a shorter period of time than complainant, she would not supervise the 18-20 employees in Criminal Records unless both Lt. Atkinson and complainant were absent. Tr. pp. 457, 482, and 545-546.

21. SGM did not teach fingerprint at the State Police Academy; and, she had no public speaking experience. Tr. pp. 478-479.

22. SGM had a psychiatric condition which caused her to decline to carry a gun for a period of time prior to becoming UCR Director and had been removed from uniform and field duty on stake out because of that incident.

23. SGM received favorable reviews with numerous positive comments from Lt. Atkinson prior to May 1992. Tr. pp. 458-464.

24. SGM did show an interest in computers and had authored a grant proposal to automate criminal histories in Uniform Crime Reports; having taken computer classes on her own; and learning through asking and assimilating information. That grant proposal was complimented highly by the agency which received it. Tr. pp. 458-459, and 546-549.

25. An April 20, 1992, notice of the solicitation of applicants for the position of Director, CIB Records (i.e. Criminal Records

section) was posted. Among the nine applicants for the position were complainant, SGM, and Tom Barrick. This posting was made pursuant to the newly implemented "Career Progression System" instituted by Superintendent Buckalew. Applicants for the position were interviewed by a board of four people, asked a series of oral questions, and given a written examination. The board members tallied their scores for each of the candidates and presented their rank ordered list to the chairman of the interview board, who compiled a recommendation list based upon the individual recommendations of the interview board members. The results of that rank list were that Tom Barrick was ranked first, SGM second, and complainant third. Superintendent Buckalew selected Tom Barrick to fill the position of the Director of Criminal Records based upon this rank order list. Tr. pp. 57-58, and 603-604; and Complainant's Exhibit No. 8.

26. The interview board was appointed by Superintendent Buckalew on May 1, 1992, ; and, it consisted of Mr. Dave Robert's, a computer consultant to the State Police, and three other current or former members of the State Police: Lt. Starcher, Lt. Atkinson, and Maj. Bias. The interview process consisted of one person, Maj. Bias, asking oral questions, and then a written exam. Superintendent Buckalew appointed Tom Barrick Director of Criminal Records on May 19, 1992. Tr. p. 58; and Complainant's Exhibit No. 8.

27. The interview board met on May 7, 1992. At that time, the complainant had the rank of Corporal, Mr. Barrick had the rank of T/Sargent, and SGM had the rank of Trooper First Class. Stipulation of Fact filed December 30, 1997.

28. The respondent does not contend that rank at the time of application was a factor in the ranking and evaluation of the candidates. The undersigned finds as a matter of fact that rank of the candidates at the time of the interview and selection of the candidate for Director of Criminal Records, was not a consideration based upon the fact that SGM was ranked ahead of Complainant despite complainant's hirer rank. The undersigned also finds that based upon the designation of T/Sargent that the rank and pay of those in the technical fields at the Crime Lab is distinct from that of regular troopers not hired as chemists for the Crime lab.

29. There are several factors indicating that Major Bias had interfered in the process of the Career Selection Process for filling the posting for head of Criminal Records section, to assure the selection of Mr. Barrick.

30. Supervisory positions normally required prior supervisory experience, which Mr. Barrick did not possess. The posting for this position did not have such a requirement. Captain Bedwell admitted that the draft posting he received from Lt. Atkinson for his replacement contained very detailed requirements including specific number of years of supervisory experience. Captain Bedwell indicated Superintendent Buckalew had problems with limiting the applicant pool in this fashion and so rewrote the posting to have minimal requirements for the position. Tr. pp. 242, and 707-709.

31. Both prior to and after institution of the Career Progression Process by Superintendent Buckalew; the practice had been and continued to be that male assistant directors were promoted from within the divisions. Tr. pp. 253-255, and 369.

32. Prior to and after May 1992, the practice of the respondent had been that persons coming into the State Police to work in the forensics lab were hired to work in the lab and consequently received a lesser amount of Police Academy training. There was a policy that those working in the crime lab as chemists were not allowed to transfer out to other posts. Although the respondent cited an example of another chemist allowed to transfer out, that was a recent occurrence. Jeff Taylor testified credibly that the policy in 1992 precluded transfers of chemists from the crime lab. Nevertheless, Maj. Bias had asked Mr. Barrick's supervisor at the lab, Lt. White, if there would be any problem with Mr. Barrick leaving the lab, before the testing procedure was begun. Tr. pp. 251-252, 276, 321, and 537-538.

33. Major Bias was biased against women. He testified that he ate meals with everyone with whom he worked. Yet, he never ate meals with either complainant or SGM, who were the only women with whom he worked. Tr. pp. 345-346.

34. Complainant asked Lt. Atkinson if he knew what types of things the applicants would be asked, and he told her he could not discuss the matter as he anticipated being appointed to the interview board. He suggested that she contact the promotional standards officer. Complainant obtained a copy of the statement of job duties and responsibilities that was specifically referred to as being available from Capt. Egnor. Tr. pp. 224-227; and Complainant's Exhibit No. 8.

35. Meanwhile, Mr. Barrick had been given a copy of a study guide by Charlie Bedwell in planning and research. This guide is

identified as Complainant's Exhibit No. 3, which contains questions closely corresponding to those asked by Maj. Bias during the oral interview. No-one else received a copy of this study guide from Capt. Bedwell and no-one else was advised to contact Capt. Bedwell concerning the vacancy in the Criminal Records. The applicants all indicated that having such a study guide in advance would have been helpful. Despite the fact that such questions were of the type one might commonly expect in an interview, the undersigned concludes as a matter of fact, that Mr. Barrick's receipt of the study guide was extremely helpful in the formal timed oral interview to which the applicants were subjected. Tr. pp. 173-178, 182-186, 239, 267-268, 433; Complainant's Exhibit No. 3.

36. Capt. Bedwell gave a copy of the study guide to Mr. Barrick. His testimony that he would have given this information to others if they had asked is not believable. He admitted that he couldn't recall that anyone else had received a copy of the study guide; and admitted that other applicant's may have asked him for help without receiving this study guide. Tr. pp. 700-701, and 703.

37. When questions arose regarding this matter with Maj. Bias he concluded that this practice was acceptable. Later an internal investigation of the situation in Criminal Records was conducted, investigating these allegations and those concerning Capt. Bedwell's affair with his secretary. During his interview by the internal investigating officer, Maj. Bias stated that, "Mr. Barrick needs to learn not to be so truthful. When someone asks him a question, he answers truthfully, and you can't do that with employees." Maj. Bias

goes on to advocate that stonewalling is appropriate to such a situation. Tr. pp. 350-353.

38. The undersigned concludes as a matter of fact, that Maj. Bias desired to have Mr. Barrick receive the promotion to Director of Criminal records; tailoring the posting and composition of the interview board, and evaluating the applicants so as to obtain Mr. Barrick's promotion.

39. The undersigned concludes as a matter of fact that Maj. Bias's desire to have someone familiar with the computerization and automation of Criminal Records played a major role in his actions on behalf of Mr. Barrick; however, the conscious or unconscious discriminatory attitude toward complainant and SGM was also a substantial factor in his actions.

40. The undersigned finds further as a matter of fact that the complainant was discriminated against on the basis of sex in the scoring of the members of the interview board.

41. The score sheet of Maj. Bias rated both as 3 (on a scale where 1 was the lowest and 5 was the highest) in the category for administrative/supervisory. This ranking appears tainted by discriminatory animus toward women and pretextual, given the fact that Mr. Barrick had absolutely no supervisory experience, while complainant had demonstrated a solid two to three years experience directly supervising the work of a civilian clerk; and filling in as supervisor of 18-20 in Criminal Records in Lt. Atkinson's absence. The same pretext appears to be at work in the ranking of both complainant and Mr. Barrick for knowledge of the section, when complainant had been in duty for five years or more in Criminal

Records and Mr. Barrick had never been involved in that section having been a chemist in the trace evidence unit over the course of his considerably lesser tenure with respondent. Tr. pp. 335-338.

42. Surprisingly Maj. Starcher rated both 3 regarding knowledge of job duties; Lt. Atkinson rated complainant 2, and Mr. Barrick 4 in knowledge of job duties, and both Mr. Barrick and complainant 4 in knowledge of section, when he knew Mr. Barrick had never worked there. These types of scores, in light of the obvious experience advantage in favor of the complainant, who worked in the Criminal Records section, permit no other inference but that these scores at least were influenced substantially by a gender based bias. Similarly Lt. Atkinson rated Mr. Barrick 4 and complainant 3 for administrative experience/ supervisory experience, although he was certainly aware that Mr. Barrick had not demonstrated supervisory experience, while complainant had demonstrated that supervisory experience. Tr. pp. 379-380, and 521-525.

43. The undersigned concludes that the respondent engaged in unlawful gender based discrimination in the rating of applicants before the interview board which produced the rank order list of recommendation which Superintendent Buckalew relied upon in appointing Mr. Barrick as Director of the Criminal Records section.

44. Complainant was embarrassed and hurt by the fact that she was not the successful applicant and by the favoritism shown to Mr. Barrick in the application process. Tr. p. 246.

45. Complainant received a disability pension effective February 4, 1997; and, therefore makes no claim for reinstatement to the position of Director of Criminal Records section, or for back pay

damages after that date. Stipulations 1 and 2, entered June 30, 1997 and filed with the Commission's ALJ on July 3, 1997.

46. Complainant's actual earnings for this period were \$155,881.30. Complainant's earnings for this time period would have been \$171,012.25. Back pay exclusive of interest is \$15,130.95. Stipulation No. 2.

47. The undersigned finds as a matter of fact that complainant did not fail to mitigate her damages by accepting an offer as EEOC/Affirmative Action Officer, as that offer was not made subject to her knowledge that it would entail a raise one year in the future from the date it was offered, and since she was encouraged by respondent to accept alternate assignment working on a history of the State Police. Tr. pp. 621-624, and 717.

48. The next highest applicant in the scoring process under the rank order list submitted would have been SGM, who would have been appointed by Superintendent Buckalew if Mr. Barrick were not considered. Tr. p. 574.

B.

DISCUSSION

In order to make out a prima facia case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the complainant must offer proof of the following:

1. That the complainant is a member of a protected class;

2. That the employer made an adverse decision concerning the complainant;

3. But for the complainant's protected status, the decision would not have been made.

Conaway v. Eastern Associated Coal Corporation, 178 W.Va. 164, 358 S.E.2d 423, at 429 (1986); see also Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 W.Va. 675, 383 S.E.2d 857, 860 (1989). Criterion number three (3) of this formulation, inappropriately labeled the "but for" test, is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by the three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the respondent then has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the adverse employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot, supra. Where pretext is shown discrimination may be inferred, Barefoot, supra, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" analysis applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant needs to show that gender played some role in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if it had not considered complainant's gender. Barefoot, 457 S.E.2d at 162, n.16; 457 S.E.2d at 164, n. 18.

Once the complainant establishes a prima facie case of discrimination the burden shifts to the respondent to offer evidence

that the complainant was not offered employment or someone else preferred, for a legitimate nondiscriminatory reason, which must be clearly stated and reasonably specific. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981). Should the respondent articulate a legitimate nondiscriminatory reason for rejecting the complainant, "then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely pretext for unlawful discrimination." Shepardstown, 309 S.E.2d at 352. The complainant "may succeed in this either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered reason is unworthy of credence." Burdine, 450 U.S. at 256. See also O.J. White Transfer Storage Company v. West Virginia Human Rights Commission 181 W.Va. 519, 383 S.E.2d 323, 327 (1989).

The complainant has established a prima facia case of employment discrimination in that she is a woman, she was passed over for the position of Director of Criminal Records section, and a male candidate with no experience in the subject section, no prior supervisory experience, and less seniority and training was selected to fill the vacancy. The complainant has therefore established facts sufficient to establish an inference that unlawful gender based discrimination resulted in the complainant not being selected to fill the position; thus establishing her prima facia case for employment discrimination under the test in Conaway.

The respondent has articulated two, somewhat contradictory legitimate non-discriminatory reasons for the selection of Mr. Barrick

over complainant. The first reason advanced is that the best candidate was selected for the position as a result of the fair application of the "objective" "Career Progression System" following the ratings established by the interview board appointed under that process. This reason has been proven by a preponderance of the evidence, to be pretext for unlawful gender discrimination in what are essentially subjective rankings of the candidates by the interview board. The undersigned concludes as a matter of fact, that obviously subjective evaluations of the three highest ranked candidates' scores in the categories related to supervisory experience and to knowledge of the section's operations, are not in line with the known objective superiority of the experience of the complainant in both these areas when compared to the utter lack of experience on the part of the successful male candidate. The undersigned rules as a matter of law that the representations of respondent's interview board that their rankings based upon the interview answers alone, are not worthy of credence, in light of this total lack of objective qualification based on the known relative experience of the the complainant viz a viz Mr. Barrick regardless of how superior their subjective evaluations of those responses at the interview were. The explanations that these responses were more complete or that they didn't rate complainant's responses as highly, just isn't very convincing given the demeanor of those witnesses observed and their admitted knowledge of the respective candidates, their relative seniority and duty assignments. Such finding of pretext in these rankings of the candidate in these particular categories where the relative experience was known and that these rankings did not match those known differences in experience,

indicate that the subjective evaluations were in fact a cover for conscious or unconscious gender based discrimination. The selection of Mr. Barrick as the successful candidate in this ranking process was based upon unlawful gender based discrimination, which resulted in embarrassment and hurt to the complainant.

The respondent has also advanced as a reason for the selection of Mr. Barrick, the fact that he possessed invaluable computer skills which resulted in his selection because the Criminal Records section was undergoing automation at the time of the hiring for the position of Director. The undersigned concludes as a matter of fact, that the preponderance of evidence compels a finding that this reason played a part in the decision to hire Mr. Barrick. It is clear from the composition of the interview board, that Major Bias desired to take into account the projected attempt to computerize the functions of the Criminal Records section. The fact that Mr. Barrick had worked with Major Bias on a computer grant and subsequently received a study guide from Captain Bedwell, who worked with Major Bias in planning and research to develop the career advancement system, while no other candidates obtained such help; is indicative of Major Bias's desire to see that Mr. Barrick received that position. Further it is the conclusion of the undersigned, that Major Bias's hand was at work in Capt. Bedwell's revision of the job posting, ostensibly because of Superintendent Buckalew's purported desire to maximize the number of potential candidates, when the supervisory experience requirement and highly task specific requirements related to the actual functions performed in Criminal Records were removed from the posting.

On the other hand, it is also the conclusion of the undersigned that unlawful gender based discrimination against both SGM and the complainant played a very substantial part in the decision to select Mr. Barrick, and for Major Bias to undertake the formerly referenced artifices in the posting, the composition of the board and the furnishing of a study guide to Mr. Barrick. The undersigned bases this conclusion on the fact that Major Bias indicated that he ate lunch with all his fellow officers, but that didn't happen to include either SGM or complainant, with whom he worked. It is further based upon the fact that his subjective rankings of the complainant viz a viz Mr. Barrick under categories where Mr. Barrick was known to have absolutely zero experience, while the complainant had considerable experience, indicated pretext for unlawful gender based discrimination in the rankings assigned by Major Bias. Finally, it is based upon the undersigned's personal observation of the demeanor of Major Bias, as well as his admitted advocacy for the need to be untruthful and uncooperative with investigators, as well as employees, in relation to personal and personnel matters, respectively. Thus this reason advanced for the selection of Mr. Barrick must be analyzed under the "mixed motive" doctrine.

Since the undersigned has concluded that unlawful gender based discrimination played a substantial role in the selection of Mr. Barrick as Director of Criminal Records; the respondent can escape liability only by proving by a preponderance of the evidence that it would have made the same decision even had it not considered complainant's gender. Barefoot, supra, at 162, n. 16; and at 164, n.18. The undersigned concludes as a matter of fact that the

respondent has not demonstrated by a preponderance of the evidence that it would have selected Mr. Barrick in the absence of unlawful gender discrimination. This conclusion is based upon the fact that unlawful gender based discrimination entered into the subjective evaluations of the interview board, which nominally determined the applicant who would be chosen. These pretextual ratings, can not now be resurrected to indicate the objective superiority of Mr. Barrick to the complainant. Thus the respondent has engaged in unlawful gender based discrimination against the complainant by selecting Mr. Barrick based upon the subjective ratings assigned by the interview board. Furthermore, an examination of the qualifications of SGM and her demonstrated abilities in preparing a successful computerization grant application for her criminal histories in Uniform Crime Reports, together with her known experience supervising employees, and knowledge of the operations of Criminal Records by virtue of her duty assignments in that section for a considerable period of time, given Mr. Barrick's utter lack of such supervisory experience or duty in Criminal Records; indicates, that, but for the unlawful gender based discrimination; and, even considering the computer abilities of Mr. Barrick and SGM respectively, Mr. Barrick would not have been selected for the position of Director of Criminal Records.

Unfortunately, Barefoot, did not address the issue confronted today, where the respondent has been shown to have discriminated unlawfully on the basis of gender, in its hiring decision, but where the complainant cannot prove by a preponderance of the evidence that she would have been the candidate selected had that discrimination not occurred in the promotion process. The complainant was the third

highest ranked applicant based upon the subjective ratings assigned by the interview board. The second highest ranked candidate for this position, was unfortunately for the complainant, also a member of the complainant's protected class. Recognizing this problem in her case, complainant has attempted to prove that SGM would not have been selected in the absence of the selection of Mr. Barrick because SGM had previously been ostracized in the police community due to an instance of depression which she had felt necessitated her refusal to carry a gun, which compromised her ability to perform her duty on a stake out assignment. The undersigned is not convinced by this argument, nor by the supposition that the respondent's interview board conspired to have SGM ranked ahead of complainant for the purpose of insulating itself from potential back pay liability to complainant. In regards to SGM's prior problem with depression, the evidence was clear that Lt. Atkinson had not held that against SGM upon her assignment to his section. His evaluations of SGM were very good. He was certainly impressed by SGM's writing of the computerization grant application. Furthermore, Lt. Atkinson was able to articulate why he had ranked SGM ahead of complainant in the subjective evaluations. The idea that this was deliberately undertaken to rank SGM ahead of complainant doesn't make sense when one remembers that the rankings were undertaken prior to complainant's making inquiries into the selection of Mr. Barrick and her filing of a discrimination complaint. There is no reason for the respondent's interview board to have ranked SGM ahead of complainant , when its liability for back pay based upon unlawful gender based discrimination in the selection of Mr. Barrick would be just as great should SGM have filed a complaint. Thus it

must be concluded that the complainant has not demonstrated by the preponderance of the evidence that she would have been the successful applicant for the Director position; and, therefore, complainant is not entitled to any back pay award.

Complainant was embarrassed and hurt by the unlawful gender based discrimination in the evaluation of the applicants and the selection of a less qualified male candidate for Director of Criminal Records; and is further entitled to an award of incidental damages in the amount of \$3,277.45, for humiliation, embarrassment, emotional distress and loss of personal dignity; as a result of respondent's unlawful discrimination. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W.Va. 1, 239 S.E.2d 145 (1977). A cap on incidental awards for non jury trials is set at \$3,277.45, as this is the amount of damages approved in cases before the West Virginia Human Rights Commission by the West Virginia Supreme Court in Bishop Coal Company v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989), as adjusted to conform to the consumer price index.

C.

CONCLUSIONS OF LAW

1. The complainant, Sharen S. Deitz, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.

2. The respondent, WV Department of Public Safety/WV State Police Dept., is an employer as defined by W.Va. Code §5-11-1 et

seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with W.Va. Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W.Va. Code §5-11-9 et seq.

5. Complainant has established a prima facie case of discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful gender based discrimination.

7. Complainant has proven by a preponderance of the evidence that unlawful gender based discrimination played a substantial role in the respondent's decision to hire Mr. Barrick as Director of Criminal Records section; while the respondent has failed to demonstrate by a preponderance of the evidence that Mr. Barrick would have been the successful candidate had unlawful gender based discrimination not played a role in its decision.

8. Although the unlawful discriminatory action of the respondent in evaluating the candidates for the director position embarrassed and hurt the complainant, the complainant is not entitled to backpay as the second ranked candidate for the position was also a member of the same protected class as that of the complainant; and would have been selected by Superintendent Buckalew were Mr. Barrick not selected for the position.

9. As a result of the unlawful discriminatory action of the respondent in evaluating candidates for the position of Director of Criminal Records, which resulted in embarrassment and hurt to the complainant, the complainant is entitled to an award of incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

10. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to an award of reasonable attorneys fees and cost in the aggregate amount of \$59,087.64.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. The respondent is not liable to the complainant for any award of back pay, as complainant has not demonstrated by a preponderance of the evidence that she would have been the successful candidate absent unlawful gender based discrimination, since another member of the protected class was ranked ahead of complainant for this position.

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of

personal dignity suffered as a result of respondent's unlawful discrimination.

4. The respondent shall pay reasonable attorneys fees and costs in the aggregate amount of \$59,087.64.

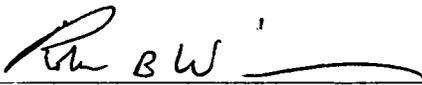
5. The respondent shall pay ten percent per annum interest on all monetary relief.

5. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 16th day of January, 1998.

WV HUMAN RIGHTS COMMISSION

BY: 

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE