



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Bob Wise
Governor

Ivin B. Lee
Executive Director

**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

October 31, 2002

Bahiyih Fareydoon-Nezhad
144 Oakwood Rd.
Charleston, WV 25314

ATTN: Janice Holland, Director
WV Div. of Vocational Rehabilitation
PO Box 1004
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Jamie Alley
Assistant Attorney General
Civil Rights Division
812 Quarrier St. -2nd Floor
PO Box 1789
Charleston, WV 25326-1789

M. Claire Winterholler
Assistant Attorney General
WV Div. of Rehab. Services
State Capitol Complex
PO Box 50890
Charleston, WV 25305

Re: Fareydoon-Nezhad v. WV Division of Rehabilitation Services
EASRANCNOREL-207-99 and ERNORLARP-105-01
EEOC Numbers: 17J990090 and 17JA10029

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 January 1, 1999, 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,

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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 administrative law 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 an 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 an 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 administrative law 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.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

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10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

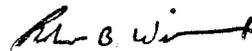
10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. 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 an 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 Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RBW/mst

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BAHIYYIH FAREYDOON-NEZHAD,

Complainant,

v.

DOCKET NUMBER(S): EASRANCNOREL-207-99
ERNORLARP-105-01

EEOC Number(S): 17J990090
17JA10029

WEST VIRGINIA DIVISION OF
REHABILITATION SERVICES,

Respondent

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on April 16, 2002, in Kanawha County, in Conference Room B, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Bahiyyih Fareydoon-Nezhad, appeared in person and by counsel for the Human Rights Commission, Jamie S. Alley, Assistant Attorney General, in the Civil Rights Division of the Office of the West Virginia Attorney General. The respondent appeared in person by its representative, Jim Quarles, Human Resources Manager and Warren Moreford, Legal Services; and by their counsel M. Claire Winterholler, Assistant Attorney-General and Kelli D. Talbott, Senior Assistant Attorney General. The Public Hearing was concluded on May 16, 2002 and briefs were submitted through September 25, 2002.

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 arguments 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 arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Respondent, has not contested that it is an “employer” and a “person” as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively.
2. Complainant, Bahiyyih Fareydoon-Nezhad, is a sixty-one year old female resident of Charleston, Kanawha County, West Virginia. Complainant was born in Karachi, Pakistan and is of the Asian race; she was raised in Pakistan and attended school there. Tr. Vol. I, pages 22-25, 30 and 31.

3. Complainant's native language is Urdu, the Islamic version of Hindi written in Arabic script; she also speaks Dari, the Afghan dialect of the modern Persian language and English. Tr. Vol. I; pages 22 and 23.

4. Complainant is a practicing member of the Baha'i faith. It was founded in 1844 by Baha'u'llah in Iran. The faith believes in the oneness of man, that all races and men and women are equal. The faith believes in all the religions of the world, Christianity, Hinduism, Islam; and that prejudice should be eliminated. Tr. Vol. I; page 22.

5. Complainant attended the University of Karachi and obtained her Library Science degree and M.A. in Library Science from that institution. Complainant obtained her Master of Library Science from University of Kentucky in 1988, having commuted between Huntington, West Virginia, where she held a full time position at Marshall University, and Lexington, Kentucky, where she attended class. Tr. Vol. I, pages 24, 26, 38 and 39; Commission's Exhibit No. 1.

6. Complainant has extensive work experience as a librarian. She was a librarian at Pahlavi University, in Shiraz, Iran; performing cataloging and circulation duties there, from 1964-1968. She was librarian at the Education Library, Edmonton, Canada, doing cataloging, from 1977-1978; and, at the Computing and System Division Library, Edmonton, Canada, doing cataloging and circulation, from 1978-1979. She was a Library Technician I, at the University of Charleston, Charleston, West Virginia, supervising the circulation desk and inter library loans from 1979-1980. After attending beautician school, she got her license, but could not continue in that occupation because she was allergic to the chemicals. She moved

to Huntington while her children attended Marshall University and got a job there as a Library Clerk II, Library Technical Assistant I and II initially from 1984-1989. After obtaining her Masters degree from the University of Kentucky; she became Librarian II, Assistant Professor, and Head of the Circulation Department at the James E. Morrow Library, Marshall University, in Huntington, West Virginia. She served in that capacity for most of the time between 1989 and 1995, when her contract was not renewed in 1994. Tr. Vol. I, pages 26, 27, 36-48; Commission's Exhibit No. 1.

7. After her employment with Marshall University, complainant again sought employment, sending out resumes and stopping by various libraries. She spoke with an acquaintance who worked at Division of Rehabilitation Services, Medical Director, Dr. Mukkamala, who spoke to a Mr. Kennedy, asking that he inform complainant should an opening arise in the Division of Rehabilitation Services library. After interviewing with Mr. Ken Kennedy, the interim administrator; Ms. Christy Lucas, the Librarian, and Ms. Nancy Board, Chief of Staff Development; effective January 8, 1997, complainant was appointed as Provisional (and shortly thereafter Original) Intermittent Librarian, with the respondent. As Intermittent Librarian with respondent, complainant would not be eligible for participation in the retirement or insurance programs. Commission's Exhibits No. 2 and No.3; Tr. Vol. I, pages 48-50, Vol. VI, pages 32-34, and 40.

8. Complainant's employment continued, alternating in status from that of Intermittent Librarian and Contract librarian, employed through WVARF or Goodwill Industries, due to the fact that an intermittent employee is limited to 945 hours per year. The

terms of her employment remained unchanged however. Tr. Vol. I; pages 57-60.

9. In June 1998, complainant became aware of an impending opening for a full time Library Assistant position, because Ms. Lucas told her she would be transferring to another position with respondent. Ms. Lucas indicated that she should get on the register to apply for the full time position. Complainant filled out her job application form and filed it with the West Virginia Division of Personnel. Tr. Vol. I, pages 67-71.

10. Ms. Angela Farha was made manager of Staff Development in May 1998. At that time, Christie Lucas was the full time Library Assistant. Shortly thereafter, Ms. Lucas resigned and Ms. Farha received permission to post the vacancy for the full time permanent position of Library Assistant. The posting was dated June 8, 1998. After he was provided them from the Division of Personnel, Ms. Farha received a copy of the register and the applications, from Mr. Thomas in respondent's personnel office. Ms. Farha then scheduled interviews with the applicants on July 6th, 7th and 10th. Ms. Farha interviewed six persons for the position of Library Assistant: Dale Williamson, the complainant, Gwendolyn Sizemore, Patricia Wenger, Rebecca Sue Baldwin, and Kellie D. Booton. Commission's Exhibits No. 6 and No. 88; Tr. Vol. V, pages 4-7 and 87.

11. After the interviews and reviewing the references from Ms. Kellie Booton and Ms. Rebecca Baldwin; Ms. Farha selected Ms. Booton as the successful candidate for the full time library assistant position. Prior to leaving July 30th for maternity leave, she forwarded her selection to Janice Holland and that selection was subsequently approved while she was off on maternity leave. Tr. Vol. V, pages 13, 18, 23, 24 and Vol. VI, page 26.

12. Ms. Farha states that Ms. Booton was selected because she gave the best interview and did not select the complainant because of unsolicited feedback that she could not handle the volume of work, that she could not manage the patrons and was not a self starter. This testimony is not credible to the undersigned. Tr. Vol. V, pages 13, 14 and 18.

13. According to her resume, at the time of the interviews, Ms. Booton was attending Marshall University and would obtain her BA in Sociology in December 1998. The resume indicated that she had 15 hours of Library Science course work and had experience working in the Morrow Library at Marshall University as work-study, student assistant and full-time temporary employee for four years from August 1994 through June of 1998. Her prior job experience was limited to student aid at East Lynn Lake from June 1993 through September 1993. Commission's Exhibit No. 55.

14. The input received by Ms. Farha regarding the performance of complainant, in fact, was solicited by Ms. Farha shortly after becoming Manager of Staff Development when she called Ms. Lucas and specifically asked how Ms. Nezhad was doing and was told, "she does what I tell her but she works at a slow pace". At the time, Ms. Lucas had been delegated authority to supervise her day to day assignments, but both had been under the direct supervision of Nancy Board in Staff Development. The significance of this input must be put in context of the fact that initially, the complainant had assisted in cataloging and shelving in the consolidated library, processing cards on the ascension lists, put up newspapers, and helped assist patrons. Later she assumed partial responsibility for making changes to the agency manuals and processing inter library loans. Furthermore, when Ms. Lucas transferred,

complainant took on the additional responsibility of ordering books, working on the agency manuals, facilitating inter library loans and maintaining the stacks; as well as, preparing the monthly statistics. These duties being undertaken from mid-June 1998 through September 15, 1998, upon the recommendation of Ms. Farha. Neither Ms. Board nor Ms. Lucas had any problems or concerns with complainant's work nor did Ms. Board ever take any disciplinary actions against complainant. Furthermore, it is undisputed that although Ms. Lucas formulated some questions for Ms. Farha to utilize during the interviews, neither Ms. Lucas nor Ms. Board had any input whatsoever into the decision of Ms. Farha in regard to hiring the Assistant Librarian. Additionally, both Ms. Lucas and Ms. Board have written letters of recommendation for the complainant. Commission's Exhibits No. 31, No. 32 and No. 50; Tr. Vol. I, pages 59 and 83; Tr. Vol. IV, pages 50, 51, 59, 64-67, 69, 71, 72, 96 and 99; Vol. V, pages 11 and 89.

15. At the time of the interviews, Ms. Farha was aware that complainant needed religious accommodations for her religious holidays, that she was over the age of forty, that she was not Caucasian, that she was from Pakistan and Iran, and that she spoke English with an accent. Ms. Farha was further aware that Ms. Booton was a Caucasian, under forty and spoke with a Wayne county accent; and, that Ms. Baldwin was also white and under forty years of age. Tr. Vol. V, pages 105, 106, 139 and 165; Commission's Exhibits No.1 and No.57.

16. Ms. Farha indicated that her top three selections after the interviews were Kellie Booton, Rebecca Baldwin and Dale Williamson. Examining Ms. Farha's interview notes reveals that complainant shared her ideas for the library with Ms. Farha and that she had some good ideas as far as self starter criteria and that she exhibited signs for evaluator criteria. In

contrast, Ms. Farha's notes from Ms. Booton and Ms. Baldwin include no notations concerning their skills as a self-starter or evaluator; and, as to Ms. Booton, no comments regarding good ideas for the library. It is particularly incongruous that her other top two selections were persons whom she had identified as having red flags; Ms. Baldwin having a short term work history and Mr. Williamson, possessing a M.S. in library science while working as a janitor. Commission's Exhibits No. 61, No. 64, No. 65 and No. 70; Tr. Vol. V, pages 16, 99 and 103.

17. Complainant was by far the most qualified of all the applicants in terms of both relevant job experience and relevant education. Tr. Vol V, page 91.

19. Complainant has proven by a preponderance of the evidence that she was denied the full time Library Assistant position by the respondent, as the result of illegal discrimination on the basis of her age.

20. Complainant has proven by a preponderance of the evidence that she was denied the full time Library Assistant position by the respondent, as the result of illegal discrimination on the basis of her national origin and race.

21. Complainant has proven by a preponderance of the evidence that she was denied the full time Library Assistant position by the respondent, as the result of illegal discrimination on the basis of her religion.

22. Upon learning that the respondent had hired a younger, less qualified white applicant; complainant felt disheartened, embarrassed and very humiliated. Complainant is entitled to 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. Tr. Vol. I, pages 87 and 88.

23. The complainant has suffered lost wages and benefits from Mid September 1998 through the end of October 2002, in the amount of \$122,359.00. This is based upon the complainant having been entitled to up to one half of the maximum salary for the posted position under the posting and regulations of the Personnel Division; or \$1,890.00 per month, and benefits approximately equivalent to 30% of the salary, for a total of \$2,448.00 per month, from Mid September of 1998 until October 1, 2001; at which time respondent gave a \$756.00 across the board raise averaging to \$63.00 per month more; and benefits approximately equivalent to 30% of the salary, for a total of \$2,539.00 per month, from October 2001 through October 2002. Commission's Exhibits No. 6 and No. 41.

24. Complainant went back to Goodwill contract employment at the respondent's library in Mid September 1998 earning \$3,933.26 in 1998 and \$14,621.94 in 1999. Complainant has also worked part time at West Virginia Business College earning \$870.00 in 2000, \$13,378.00 in 2001 and assuming a maximum earning of \$1,250.00 per month, another \$12,500.00 for January 1, 2002 through October 31, 2002. The complainant has total mitigation of \$45,303.20 from September 15, 1998 through October 31, 2002. This excludes all income earned from Dr. Agarwal as respondent has not shown that her ability to earn from this source would have been affected by her having received the full time Assistant Librarian position. Commission's Exhibits No. 35 and No. 36.

25. The complainant undertook reasonable efforts to mitigate her damages, evidenced by her testimony regarding those efforts and the fact that she in fact found other employment.

Respondent has not shown that there was other employment available to complainant for which she did not apply; and, contrary to respondent's assertions, complainant believed she was on the register for state employment already, while respondent apparently never made an unconditional offer of employment to complainant when the full time assistant position became available, or even made her aware of that posting. Tr. Vol. III, pages 73, 75, 82, 83, 150 and 151.

26. The complainant is entitled to a back pay and benefits award after mitigation of \$77,055.80 from September 16, 1998 through October 31, 2002, plus pre judgement interest in the amount of \$31,785.52, for the period of September 15, 1998 through October 31, 2002; based upon a simple 10% interest per year on the total back pay award over that span calculated from the date of the injury, September 16, 1998, when complainant would have become a full time Assistant Librarian but for the illegal discrimination by the respondent.

27. Complainant filed a second complaint with the Human Rights Commission following the termination of her contract employment with respondent through WVARF and Goodwill Industries effective December 15, 1999. See Copy of Complaint ERNORLARP-105-01; Commission's Exhibits No. 30 and No. 98.

28. The respondent's supervisory personnel were immediately aware that complainant disagreed with the failure to hire her for the full time position as Library Assistant and scheduled a meeting with Ms. Farha, Ms. Holland and the complainant in October 1998 at which time they were on notice she would take further action. Complainant filed the initial complaint with the Human Rights Commission in January 1999 and Ms. Farha was certainly

aware of that complaint by the time she signed the verified answer on behalf of the respondent on July 1, 1999. Tr. Vol. I, pages 92-94, Vol V, pages 24 and 25; Commission's Exhibit No. 73.

29. Respondent immediately failed to restore complainant to intermittent status when she again became eligible in January 1999; although the 1997 memo indicates that this was the standard practice. Ms. Farha was angry with the complainant for filing the complaint for her failure to hire her full time as Library Assistant I, and attempted to get the Goodwill supervisor to discipline complainant. Tr. Vol. I, pages 103-104; Vol. III, page 199; Commission's Exhibit No. 5.

30. Ms. Farha spoke to Ms. Booton regarding her willingness to testify against complainant. In early December 1999, complainant filed a written notice to Ms. Farha that Ms. Booton had made derogatory comments referencing minorities and their lawyers teaching them how to sue. Despite this, Ms. Farha made no notation in Ms. Booton's personnel file. Ms. Farha did not even give Ms. Booton a verbal reprimand regarding Ms. Booton's negative comments concerning complainant's use of her native tongue in discussions with others in the library in Ms. Booton's presence, or her problems with complainant's religion. Tr. Vol. VI, pages 19- 21, Vol. IV, page 27; Vol. V, pages 122-125; Commission's Exhibit No. 23.

31. On December 2, 1999 Ms. Farha wrote a memo to Ms. Holland requesting that complainant's hours be cut and stating that library use did not warrant a second employee. Shortly thereafter complainant was terminated without notice. Commission's Exhibits No. 30, No. 79 and No. 98.

32. Respondents non discriminatory reasons for discharging complainant on December 15, 1999 are pretextual for retaliatory discharge. Respondent did not demonstrate by a preponderance of the evidence that the work load had in fact decreased nor that any other contract employees had been laid off during the supposed budget cutback. Complainant testified credibly that the work load remained constant; while Ms. Holland could not identify any other Goodwill employees whose contracts were terminated at the same general time. Tr. Vol. II, page 68; Vol. IV, pages 84-86.

33. Complainant's employment through WVARF and Goodwill Industries was terminated in retaliation for her pursuit of protected activities under the Human Rights Act.

34. Complainant was very humiliated, embarrassed and depressed as a result of respondent's unlawful retaliatory discharge. Complainant is entitled to 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. Tr. Vol. III, page 67.

35. The Commission is entitled to an award of reasonable costs incurred in the prosecution of this matter in the amount of \$1,505.15 as set forth in Exhibit C of Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

B.

DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful, “for any employer to discriminate against an individual with respect to ... hire, tenure, conditions or privileges of employment if the person is able and competent to perform the services required...”. The term “discriminate” or “discrimination” as defined in W.Va. Code § 5-11-3(h) means to “exclude from, or fail or refuse to extend to, a person equal opportunities because of ...race, religion, color, national origin, ancestry, sex, age...”

In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W.Va. Code § 5-11-9, with regard to protected class status, the complainant must prove as prima facie case, that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the complainant’s protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

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 a 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 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 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 reason; 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 v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, 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” 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 need only show that the complainant’s

protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant's protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

Applying these standards, complainant has established that she is a member of a protected status in that she is over age forty, practices the Baha'i faith and is of Pakistani national origin. The respondent took adverse employment action against complainant when she was not selected for the full time position of Library Assistant filled effective September 16, 1998. The person selected for that position was a white female under the age of forty who was not a member of the Baha'i faith. Complainant had far superior academic credentials and work experiences. The facts thus establish a prima facie case of employment discrimination on the basis of race, national origin, religion and age. These facts alone also are sufficient to establish by a preponderance of the evidence that the decision to hire someone other than the complainant was the result of illegal discrimination based upon all of the above protected classes of which complainant is a member.

The undersigned found the witnesses that testified on behalf of respondent to be evasive and generally lacking in credibility. The non discriminatory reasons advanced in support of the decision were self serving and lacked any objective support in the record. These reasons were discredited in that complainant testified credibly that she enjoyed working with handicapped persons as evidenced by her efforts to make the Morrow Library at Marshall easier to use by disabled persons by installation of a buzzer and lift and by the fact that her own brother, Dr. Mali, is disabled and a patron of the respondent's facility. The decision makers own interview

notes indicate favorable responses to questions regarding being a self starter and that she had good ideas for the library. No such favorable notations exist for the top three selections. The fact that Ms. Farha identified two of the top three selections as having red flags, they did not even have recent relevant work experience in libraries, while passing over complainant in that group, despite a favorable interview, contributes to the inescapable conclusion that these reasons are pretext for discrimination. The testimony concerning alleged input from others was so amorphous that it could not be identified as pertaining to complainant's abilities to perform the job at issue, nor, could it be attributed to any particular individual beyond a vague statement by Ms. Lucas that complainant worked at a slow pace. When viewed in context of Ms. Farha's stated reason that Ms. Booton was more qualified, this lone statement seems very scant indeed for excluding complainant from consideration for the position, given the totally lopsided nature of the difference in work experience and education. The tasks performed in a variety of work situations by complainant simply outweigh and negate any of the reasons that were advanced by Ms. Farha for not even requesting references from complainant, while selecting others for whom she clearly had far greater red flags, as the top three from the list. It seems very suspicious that the top two selections were both females considerably younger than complainant. Should there have been legitimate concerns regarding complainant's job performance, the respondent could have set those forth in greater detail and allowed the complainant to respond. That never happened in investigation before the Commission, in responses to the complaint or responses to discovery in preparation for hearing. Some vague allusions to unspecified input about the complainant's work performance, when the decision

maker states she did not receive input in the decision from those from which it came, is just plain contradictory. It does nothing to enhance the credibility of the explanation for the decision and simply smells strongly of pretext.

The undersigned was not impressed by respondent's allegation that Ms. Farha's marriage to a West Virginia born man of "Mid Eastern" descent, is proof that Ms. Farha would not harbor ill will to someone born in Pakistan and recently living in Iran; or that raising her children bi-denominationaly, is proof Ms. Farha could not discriminate against complainant because of her Baha'i religious belief. The preponderance of the evidence simply doesn't support a finding that any legitimate non discriminatory reason exists for Ms. Farha's decision to hire Ms. Booton instead of complainant. In reaching this conclusion, the undersigned specifically considered the testimony of Ms. Board regarding her opinion as to whether or not complainant would be suited to running the respondent's library on her own over objection of counsel based upon her testimony that she had no input in the decision of Ms. Farha in hiring the full time Assistant Librarian. That testimony was weighed against the fact that Ms. Board is a current employee of respondent, the fact that she wrote a letter of recommendation for complainant, the fact that she never disciplined or complained about the work performance of complainant at any time during which she supervised complainant, the context of that opinion and that she had no input in the hiring decision; and such opinion was not found credible. Furthermore, in considering Ms. Board's testimony overall and observing her demeanor during testimony before the undersigned, the undersigned concludes that although Ms. Board states complainant's requests for religious leave were always granted (as did Ms. Farha, whose

demeanor was also observed during her testimony), such requests appear to have been resented by Ms. Board (as well as by Ms. Farha); and, such undisclosed input prior to decision by Ms. Farha most likely included the fact that she wished religious leave accommodation which Ms. Board and Ms. Farha resented. This is an impermissible discriminatory basis for Ms. Farha to have based her decision upon in failing to consider and hire complainant full time as Assistant Librarian.

The West Virginia Supreme Court has set forth the elements necessary to prove a prima facia case of retaliation: (1) that the complainant engaged in a protected activity, (2) that the complainant's employer was aware of the complainant's protected activity, (3) that the complainant was subsequently discharged and (absent other evidence tending to establish retaliatory motivation); (4) that respondent's adverse action followed her protected activities within such a period of time that the court can infer retaliatory motivation. Franks Shoe Store v. West Virginia Human Rights Commission, 179 W.Va. 53, 365 S.E.2d 251, at 259 (1986). Applying those elements, it is clear that complainant engaged in a protected activity in complaining internally about the hiring decision of Ms. Farha in selecting Ms. Booton for the full-time Librarian Assistant position and in the subsequent filing of the complaint. Almost immediately after filing the complaint, respondent failed to convert her employment back to Intermittent Librarian with respondent as it had done in prior years as complainant again became eligible. Next as problems arose between the complainant and Ms. Booton, despite complainant's having worked with Ms. Booton and helping to train her; Ms. Farha obviously began a campaign to discredit complainant, and took a one sided approach to complaints by the

two, ignoring those concerns regarding Ms. Booton, and seeking Ms. Booton's cooperation to testify against complainant. Ms. Duff, complainant's supervisor for her contract employer, Goodwill Industries, Inc, testified credibly that Ms. Farha didn't like the fact that complainant had challenged her hiring decision and filed a complaint with the Human Rights Commission. Soon after Ms. Farha made a request to cut complainant's hours and expressing her view that the second library employee wasn't necessary, the contract for Librarian services through Goodwill Industries was terminated. The complainant has made out a prima facie case of retaliatory discharge. Respondent has claimed that the position has never been filled and that the decision was related to fiscal constraints as part of cost cutting measures. The testimony by respondent's management does not indicate that other contract employees under Goodwill Industries were also cut during this time frame, there is no objective evidence of decreased library usage and the respondent's library has in fact been staffed with two for a period of overlap during 2001 of at least a couple of months. The failure to fill that position may have more to do with posturing for the instant litigation than anything else. Thus the undersigned concludes that the respondent has not proven by a preponderance of the evidence that it would have terminated the contract of complainant as Librarian absent a retaliatory motive.

The undersigned finds that the complainant has taken adequate steps to try to secure comparable employment but has not been entirely successful. Since the complainant would be entitled to greater back pay for the claim for failure to hire as a full time Assistant Librarian, the award for damages is calculated upon that basis and not on the back pay damages for the retaliatory discharge claim. Those damages have been set forth in the findings of fact

previously by the undersigned. The undersigned considered the testimony of the complainant, that she has undertaken reasonable efforts to seek comparable employment, to be credible and that the respondent has not demonstrated that comparable positions are available for complainant within the region. The undersigned is particularly unimpressed with the argument that the complainant's failure to apply for the Assistant Librarian position when it again became available constitutes failure to take reasonable steps to obtain comparable employment. Respondent has had every opportunity to offer complainant an unconditional offer of employment and submitted no evidence that such an offer was made or that complainant was encouraged to apply for the vacancy or notified of such vacancy; while complainant testified credibly that she believed she remained on the registry for librarian positions and the decision maker for that hire had already discriminated against complainant in the hiring for the position in the first instance and subsequently engaged in a retaliatory firing of complainant from her prior part time position.

The West Virginia Supreme Court has held that the Commission's jurisdiction to hear a case is dependant upon adequate notice of the discriminatory practice or those sufficiently related to or growing out of the allegations in the complaint. McJunkin Corporation v. West Virginia Human Rights Commission, 369 S.E.2d 720 (W.Va. 1986). The claim filed in ERNORLARP-105-01 involved only the termination of complainant's contract employment through Goodwill Industries and does not state a claim for hostile environment. Therefore, the undersigned declines to order any remedy for the hostile environment created by Ms. Booton and sanctioned by Ms. Farha, which the evidence in this case demonstrated.

When a legitimate candidate for a job has demonstrated that he has been the subject of unlawful discrimination in the employment process, he is entitled to an injunction against future, or continued discrimination. Nanty v. Barrows Co., 660 F.2d 1327, at 1333 (9th Cir. 1983). Therefore the undersigned finds a cease and desist order appropriate and hereby orders that the respondent's management and employees undergo a two day training session in discrimination issues to be completed within one year of the entry of this order.

C.

CONCLUSIONS OF LAW

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

2. The respondent, West Virginia Division of Rehabilitation Services, is a "person" and an "employer" as those terms are defined under 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 West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The complainant has established a prima facie case of national origin, race, religious, and age discrimination. The respondent has articulated legitimate non discriminatory motives for the respondent's actions in failing to hire complainant as a full time Librarian Assistant and

in firing her in retaliation for filing that complaint; that the complainant was not the most qualified applicant for the position of Library Assistant and that retaliation was not the motive for cancellation of the contract employment in their library; which the complainant, by a preponderance of the evidence has proven to be pretext for discrimination.

6. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity for failure to hire her as a full time Library Assistant.

7. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity for unlawful retaliatory discharge of complainant from her contract employment with WVARF and Goodwill Industries.

8. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to reinstatement in a position with the respondent comparable to the full time Assistant Librarian position, award of front pay until such time as she is reinstated, and back pay.

9. The Commission is entitled to reasonable costs in the amount of \$1,505.15.

D.

RELIEF AND ORDER

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

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

2. Within 31 days of the receipt of the undersigned's order, the respondent shall pay the reasonable costs incurred in the prosecution of this matter, in the amount of \$1,505.15 as set forth in Exhibit C attached to Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

3. Within 31 days of receipt of the undersigned's order, the respondent shall pay the 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 in failing to hire her for the full time Library Assistant position, plus post judgment statutory simple interest of ten percent.

4. Within 31 days of receipt of the undersigned's order, the respondent shall pay the 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 connected with their retaliatory discharge of complainant from her contract employment through WVARF and Goodwill Industries, plus post judgment statutory simple interest of ten percent.

5. Respondent shall instate complainant in the next available full time position in respondent's library and to provide front pay in the amount of \$2,539.00 per month less mitigation, until such time as complainant is instated to a comparable position to that which she was denied as a result of respondent's unlawful discrimination. Respondent shall pay

complainant back pay and benefits award after mitigation of \$77,055.80 from September 16, 1998 through October 31, 2002, plus pre judgement interest in the amount of \$31,785.52, for the period of September 15, 1998 through October 31, 2002; based upon simple 10% interest per year on the total back pay award over that span calculated from the date of the injury, September 16, 1998 when complainant would have become a full time Assistant Librarian, but for the illegal discrimination by the respondent, and statutory post judgment simple interest of ten percent until such time as payment is tendered.

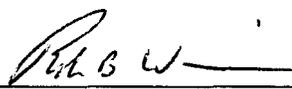
6. Respondent's management and employees shall undergo a two day training session in discrimination issues to be completed within one year of the entry of this order.

7. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 31st day of October, 2002.

WV HUMAN RIGHTS COMMISSION

BY: 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE