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**NOTICE OF FINAL DECISION**

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

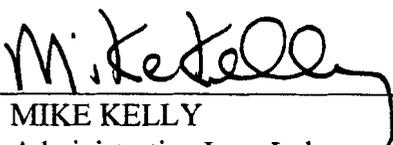
The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

All documents shall be directed to:

Executive Director  
West Virginia Human Rights Commission  
1321 Plaza East, Room 104-106  
Charleston, WV 25301

Dated this 23rd day of April, 1996.

WV HUMAN RIGHTS COMMISSION

BY:   
MIKE KELLY  
Administrative Law Judge  
Post Office Box 246  
Charleston, West Virginia 25321  
(304) 344-3293

cc: Norman Lindell, Assistant Executive Director  
West Virginia Human Rights Commission

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**ROBERT L. FERRELL,**

**Complainant,**

**v.**

**Docket No. EA-320-93**

**ELKAY MINING CO.,**

**Respondent.**

**ORDER**

THIS MATTER matured for public hearing on 25 September 1995. By agreement of the parties, the hearing was held at the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant appeared in person and by its counsel, Robert White. Respondent appeared by its designated representatives, A. W. Adams and Joe Pendergast, and by its counsel, Charles M. Surber, Jr. and Jackson & Kelly.

**I. ISSUE TO BE DECIDED**

Whether respondent violated W.Va. Code §5-11-9(1) by discriminating against complainant because of his age when it subjected him to a layoff while retaining in its employ younger workers.

## II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:<sup>1</sup>

### A. Preliminary Facts

1. Complainant Robert L. Ferrell is a white male over the age of 40 who filed a complaint in a proceeding under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. ("HRA") and is a person protected by the HRA. Mr. Ferrell was born on 27 March 1937 and currently resides in Chapmanville, Logan County, West Virginia.

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<sup>1</sup> To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

2. Respondent Elkay Mining Company (hereinafter "Elkay") is a person and employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and (d), respectively.

3. Mr. Ferrell was laid off from employment with Elkay on 9 October 1992. He was 55 years old when he was laid off.

4. On or about 11 March 1993, Mr. Ferrell filed a complaint with the West Virginia Human Rights Commission alleging that he had been selected for layoff because of his age.<sup>2</sup>

**B. Mr. Ferrell's Work History with Elkay**

5. Robert L. Ferrell worked for Elkay from April 1978 until he was laid off on 9 October 1992. During his tenure with Elkay, Mr. Ferrell worked as an electrician, a heavy equipment repairer and a mobile equipment operator. He held the latter position when laid off in 1992. He was 41 years old when first hired by Elkay.

6. Mr. Ferrell held certifications in both deep mining and surface mining, but spent his entire career working as an "outside man" doing construction, electrical and maintenance work.

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<sup>2</sup> The complaint also alleges as a second count of discrimination that Mr. Ferrell was later not recalled to work because of his age. This count, however, was voluntarily withdrawn at hearing. (Tr. 106-07).

7. In October 1992, Mr. Ferrell worked as a mobile equipment operator at respondent's Rum Creek operation, which is primarily a deep mine operation.

8. For the duration of his employment with Elkay, Mr. Ferrell was a member of the United Mine Workers of America and benefitted from the terms and conditions of its collective bargaining agreements. Mr. Ferrell testified credibly that during his employment with Elkay, he was a good performer and had never been subjected to any form of discipline.

9. In 1987, Mr. Ferrell was among several employees laid off by Elkay. He filed a grievance under the collective bargaining agreement alleging that another less senior employee, Mr. Henry Chute, was retained as a diesel mechanic, a job Mr. Ferrell claimed that he could do. Mr. Chute was older in age than Mr. Ferrell.

10. The grievance went to arbitration and the arbitrator ruled against Mr Ferrell, finding that he did not possess the necessary skills and experience required for the diesel mechanic job.

11. Mr. Ferrell was on layoff from 1987 into 1991.

### **C. The Events Leading Up to the 1992 Layoff**

12. On 18 October 1991, when he was 54 years old, Mr. Ferrell was recalled by Elkay. He was recalled by A. W. Adams, Elkay's personnel director. Mr. Ferrell admitted that at the time

of the recall Mr. Adams informed him that he was coming back to fill in for two people who were on sick/injured status: Henry Chute and Teddy Toler. It was clear that the recall was temporary and would last only until Mr. Chute and/or Mr. Toler returned to work.

13. Upon recall, Mr. Ferrell worked on the construction crew, which consisted of himself and Mr. Arthur Coburn. Mr. Coburn is approximately the same age as complainant.

14. Mr. Toler returned to work in November 1991 as a mobile equipment operator (MEO). Mr. Ferrell continued to work as a replacement for Mr. Chute.

15. Mr. Chute returned to work on 14 September 1992. He, too, resumed the position of MEO.

#### **D. The 1992 Layoff and Its Aftermath**

16. On 9 October 1992, at the end of working a shift, complainant was approached by a supervisor, Brad Wright. Mr. Wright told Mr. Ferrell "This is your last day". He was laid off effective immediately. He was the only worker laid off on that date.

17. As of 9 October 1992, Mr. Ferrell was 55 years old, Mr. Chute was 57, Mr. Coburn was 54 and Mr. Toler was 44.

18. On 12 October 1992, Mr. Ferrell filed another grievance. He alleged that he had more seniority than the retained employees and was fully qualified to operate all mobile equipment at the mine site. The grievance went to arbitration.

19. On 12 February 1993, the arbitrator rendered a decision in favor of the company. The arbitrator concluded that Mr. Ferrell had been recalled to a temporary position and that he was not as qualified to perform the full range of duties of the permanent MEO position as Mr. Chute or Mr. Toler, despite having more overall seniority than either of those two men.

20. The issues of qualifications and seniority under the contract were not seriously relitigated in this proceeding so I defer to the findings of the arbitrator on those issues and credit his findings with substantial weight.

21. Mr. Ferrell subsequently applied for retirement and was awarded a pension with an effective date of 1 November 1992. Mr. Ferrell acknowledged that he lost all recall rights under the UMWA contract as of his date of retirement. He has not been actively seeking work, or looking to be recalled, since notice that his pension was approved. He also applied for and was awarded Social Security disability benefits with an effective date of 1 October 1992.

**E. The Alleged Discrimination**

22. Mr. Ferrell testified that he was discriminated against because he was discharged while the following younger individual were retained:

Teddy Toler  
Freddie Barr  
Danny Ball  
Clinton Collins  
Mossy Miller

23. The respondent articulated that the individuals Mr. Ferrell sought to compare himself to were retained for legitimate nondiscriminatory reasons or are not proper comparison persons:

Teddy Toler: Returned from sick/injured status to resume permanent position being temporarily filled by complainant; more qualified than Mr. Ferrell to perform full range of MEO duties;

Freddie Barr and Danny Ball: Were members of a separate seniority unit from Mr. Ferrell and complainant had no right to displace them regardless of his greater seniority on the construction crew and, thus, they are not similarly situated to Mr. Ferrell for comparison purposes; and

Clinton Collins and Mossy Miller: Were supervisory employees, not members of any bargaining or seniority unit and, therefore, not similarly situated to Mr. Ferrell.

23. The evidence produced by respondent regarding the comparison persons is credited

as true.

24. Complainant failed to show that the legitimate nondiscriminatory reasons articulated by Elkay to justify its decision to layoff Mr. Ferrell in October 1992 are pretextual or otherwise unworthy of belief.

25. Complainant failed to show that his age was a factor, in any degree, in respondent's decision to terminate his employment as of 9 October 1992.

### III. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d), and a person within the meaning of §5-11-3(a) and is subject to the jurisdiction of the West Virginia Human Rights Commission.

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).

3. Complainant failed to show by a preponderance of the evidence that the reasons articulated by respondent to justify his layoff are mere pretext or otherwise unworthy of belief.

4. Complainant failed to produce any evidence that would lead a reasonable factfinder to conclude that age discrimination was a factor in respondent's decision to lay him off on 9 October 1992 or that Elkay was at all motivated by an unlawful discriminatory animus.

5. Mr. Barr, Mr. Ball, Mr. Collins and Mr. Miller were not similarly situated to complainant in that they were members of a different seniority unit or were supervisory employees and are not proper comparison persons.

6. The complainant's claim of unlawful discrimination because of age is DISMISSED.

WV HUMAN RIGHTS COMMISSION

ENTER this 23rd day of April, 1996.

BY:   
MIKE KELLY  
Administrative Law Judge  
Post Office Box 246  
Charleston, West Virginia 25321  
(304) 344-3293