



COPY

**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.  
Governor

May 1, 1986

Mike Kelly, Esquire  
Appalachian Research & Defense Fund  
1115-B Kanawha Boulevard, E.  
Charleston, WV 25301

Jack O. Friedman, Esquire  
West Virginia Department of  
Employment Security  
112 California Avenue  
Charleston, WV 25305

RE: Elaine B. Harless V.  
West Virginia Department of  
Employment Security - ES-39-81

Dear Mr. Kelly and Mr. Friedman:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Elaine B. Harless V West Virginia Department of Employment Security/Docket No.: ES-39-81.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

*Howard D. Kenney*  
(cdm)

Howard D. Kenney  
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ELAINE B. HARLESS  
COMPLAINANT,

V.

DOCKET NO.: ES-39-81

WEST VIRGINIA DEPARTMENT OF  
EMPLOYMENT SECURITY  
RESPONDENT

ORDER

On the 9th day of April 1986, the Commission reviewed Hearing Examiner Michael C. Farber's Findings of Fact and Conclusions of Law. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and and Conclusions of Law as its own with the following amendments:

1. The Commission hereby ORDERS that Respondent pay to Mike Kelly, Counsel for the Complainant, attorney's fees in the amount of Seven Hundred Ninety-Two Dollars (\$792.00).
2. The Complainant as a matter of law and fact is entitled to back-pay in the amount of \$293.40 plus interest.
3. At page 6, in paragraph 5, "\$2,500.00" should be deleted in its place "\$4,000.00" should be inserted.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order with the above amendments.

By this Order, a copy of which to be sent by certified mail, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

The Respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35)

days of service of said Order by copies of cancelled checks, affidavit  
or other means calculated to proof.

Entered this 25<sup>th</sup> day of April, 1986.

A handwritten signature in cursive script, appearing to read "Nathaniel Jackson", written over a horizontal line.

CHAIR/VICE CHAIR  
WEST VIRGINIA HUMAN RIGHTS  
COMMISSION



technician specialist. (Transcript of Hearing, pp. 11-12). Moreover, respondent admits that the complainant "was more qualified than the man who got the job." (Transcript of Hearing, p. 13). The only defense asserted by the respondent during the hearing was that the complainant "did not want the job." (Transcript of Hearing, p. 13).

4. Shortly after her interview with Hubbard, the complainant was advised that the position had been filled by another individual, a man who had been employed by the respondent for less than one year. According to the complainant, she was informed that the individual selected for the position "was better qualified than I was." (Transcript of Hearing, p. 18). Complainant stated during the hearing that such a selection "was an insult." (Transcript of Hearing, p. 18).

5. On May 20th, 1980, complainant wrote a memorandum to Virginia Harris, the manager of the Charleston Office of the respondent, concerning the subject selection wherein she states "that the selection...was not in keeping with the selection of the best qualified for positions available within our agency." (Complainant's Exhibit # 8).

6. On July 28, 1980, complainant filed a grievance before the respondent as a first step in protesting her rejection for the vacant position. Complainant states in the grievance her belief "that factors other than ability were used when this [selection] was made." (Complainant's Exhibit #4).

7. Respondent did not reply in writing to complainant's grievance but she was informed by Mr. Charles Ellison, an employee of the respondent, that the person selected for the position "was better qualified than I was." (Transcript of Hearing, p. 20).

8. Complainant described her feelings of rejection during the course of the hearing in this matter:

My first reaction was like I had been smacked. I was insulted to think that an individual with less than a year with the Agency had been put in a position on that level over me. And then the big insult was the fact that they told me he was better qualified than I was which I knew was not true.

And that was the blow. That was the final one that I, well, I felt hurt.... (Transcript of Hearing, p. 22).

9. With respect to the complainant's claim that she does not recall having any conversation with Charles Ellison or Virginia Harris concerning her lack of interest in the subject position, the undersigned carefully observed complainant's demeanor during the hearing and was convinced of her sincerity in that regard. The complainant may very well have made an off-handed remark about not getting the job, but the weight of such a statement does not counterbalance the fact that the complainant was repeatedly informed that her application was rejected due to the better qualifications of the selected person. (See Transcript of Hearing, pp. 24-32).

10. According to Charles Ellison there were five

applicants for the subject position, two being women and the other three men. All applicants were initially interviewed by Arley Hubbard who subsequently compiled a preference list of his choices for the job. The selected applicant was not included on Hubbard's list. However, a female employee of the respondent was the first to be offered the position.

11. According to an interoffice memorandum dated May 5, 1980, the first choice for the position cited "medical reasons" in rejecting respondent's job offer. Thereafter, it would appear from the record that no other individual was offered the job even though the preferred list compiled by Hubbard included four other names. No explanation was offered for this apparent inaction on the part of the respondent.

12. Nevertheless, on July 23, 1980, Mr. Westfall, a trainee employed by the respondent and a person excluded from the preferred list, was selected by the respondent to fill the subject position. According to Mr. Ellison, there was no "question...that Richard Westfall did not have the qualifications of Elaine Harless." (Transcript of Hearing, p. 37).

13. Complainant was never offered the job by the respondent for the reason that the complainant had supposedly removed herself from the competition by commenting informally that she was not really interested in the job. There is no documentation of record to confirm this reasoning other than

testimony of witnesses during the hearing, which is conflicting at best.

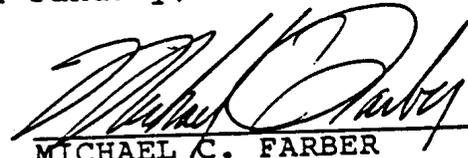
CONCLUSIONS OF LAW

1. The complainant is entitled to the protection of the West Virginia Human Rights Act, W.Va. Code 5-11-1, et seq.
2. The respondent is an employer within the meaning of W.Va. Code 5-11-3.
3. The conduct of the respondent in this matter amounts to an unlawful discriminatory practice under W.Va. Code 5-11-9 by virtue of the fact that the complainant belonged to a protected class and was denied employment for a particular position even though she was eminently qualified for the job. Further, the complainant has shown by a preponderance of the evidence that the position applied for remained open for an extended period of time until filled by a less qualified individual.
4. That respondent's excuse or explanation for denying the complainant's application was a mere pretext to disguise its actual motive for refusing this employment opportunity to the complainant.
5. That the complainant is entitled to an award of compensatory damages for her diligence and mental anguish in exhausting all remedies made available to her by the respondent

through its grievance procedure, said damages to be awarded the complainant in the amount of \$2,500.00.

6. That counsel for the complainant is entitled to payment of his fee for services rendered.

Enter this 20th day of January, 1986.



MICHAEL C. FARBER  
Hearing Examiner