



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616
March 28, 1986

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P. O. Box 907
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RE: Jonathan Hashimura V. Raleigh County Sheriff's Department
EAN-189-77

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Jonathan Hashimura V Raleigh County Sheriff's Department EAN-189-77.

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
Executive Director

HDK/kpv
Enclosure
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

JONATHAN HASHIMURA
COMPLAINANT,

V.

DOCKET NO.: EAN-189-77

RALEIGH COUNTY SHERIFF'S DEPARTMENT
RESPONDENT.

FINAL ORDER

On the 12th day of March, 1986, the Commission reviewed Hearing Examiner, Robert R. Harpold Jr.'s, Findings of Fact and Conclusion of Law. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own as own except for the following changes: 1. The award of back pay in the amount of \$534.00 (Five Hundred Thirty Four Dollars) shall be awarded with prejudgment interests until paid. 2. In lieu of the Recommendation of the Hearing Examiner, the Complainant is awarded \$5,000.00 (Five Thousand Dollars) in compensatory damages for his humiliation, embarrassment, emotional distress and loss of personal dignity. The respondent is hereby ordered to pay \$5,000.00 (Five Thousand Dollars) in such damages to the Complainant. It is hereby Ordered that no punitive damages shall be paid.

It is hereby ordered that the Hearing Examiner's Findings of Fact and Conclusions of Law except as are amended by this Order being attached hereto and made a part of this Order.

The Respondent is hereby ordered to provide to the Commission proof of compliance with the Commission's Order within 35 (Thirty Five) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

JONATHAN HASHIMURA

Complainant

vs:

CASE NO. EAN-189-77

RALEIGH COUNTY SHERIFF'S
DEPARTMENT

Respondent

*Approved
MRS
12/28/85*

Pursuant to proper notice, this case came on for public hearing before Hearing Examiner Robert R. Harpold, Jr., on October 2, 1985, in the Raleigh County Commission Courtroom in Beckley, West Virginia. The complainant appeared in person and was represented by Assistant Attorney General Steven J. Knopp. Respondents were represented by former Sheriff of Raleigh County, Okey A. Mills and by their counsel Kristen Keller. The parties agreed by stipulation to waive the presence of a Hearing Commissioner.

It appearing to the Hearing Examiner that notice as required bylaw, setting forth the time and place of the hearing and matters to be heard, has regularly been served upon the respective parties hereto and that the same appeared by their respective representatives and counsel; the hearing was convened at the aforesaid time and place.

Each of the parties was given a full and complete opportunity to present evidence, argument, and briefs in support of their respective positions; based upon review of the transcript of the witnesses' testimony and of the exhibits and stipulations placed into evidence by the parties, and based further upon observations relating to the credibility of the witnesses appearing on behalf of each of the parties, the undersigned Hearing

Examiner does hereby issue the following findings of fact and conclusions of law.

PROCEEDINGS

On December 22, 1976, the complainant Jonanthan Hashimura filed a verified complaint alleging that the Raleigh County Sheriff's Department passed over him for employment in violation of the West Virginia Human Rights Act. On January 25, 1980, the Human Rights Commission issued a letter of determination finding probable cause to believe that the Human Rights Act (hereinafter, "Act") had been violated. Thereafter, the complaint lay dormant until following the issuance of a writ of mandamus against the Human Rights Commission (hereinafter Commission) in Allen et al. v. West Virginia Human Rights Commission, ___ W. Va. ___, 324 S.E. 2d 99 (1984), a Notice of Public Hearing was signed by Human Rights Commission Chairman Russell Van Cleve pursuant to W Va. Code § 5-11-10 and served upon all parties.

Although at a prehearing conference on April 17, 1985, with appearances by Deputy Attorney General Emily Spieler for complainant and Bruce Lazenby, Raleigh County Prosecuting Attorney for respondent, full and comprehensive discovery was promised by both sides, subsequent to the prehearing conference, various problems arose regarding discovery between the parties. As a result, several motions against respondent to compel discovery and for sanctions against the respondent were filed and are still pending resolution. In view of the evidence presented at the hearing and the argument of counsel on the various motions to compel and for sanctions, the hearing examiner is of the opinion that the respondent complied as best it could to the discovery and, therefore, denies the complainant's motion to comply and for sanctions.

ISSUES PRESENTED

1. Whether or not the complainant was denied employment with the respondent because of his ancestry and in violation of Chapter 5-11-9 of the West Virginia Human Rights Act.

2. Whether respondent was or is engaged in a pattern and practice of discrimination against prospective employees based upon ancestry.

FINDINGS OF FACT

1. The complainant, Jonathan Hashimura, applied for a position as deputy sheriff by submitting a signed and completed application form to the Raleigh County Deputy Sheriff's Association on October 21, 1975.

2. The complainant is a member of a protected class under the West Virginia Human Rights Act, being of Chinese-Spanish-Filipino background, with a Japanese surname.

3. The respondent, Raleigh County Sheriff's Department, employs more than 12 persons.

4. During the period of 1975 to 1977, there was a shortage of minority individuals in the Raleigh County Sheriff's Department.

5. On March 24, 1975, complainant took, and passed, the Deputy Sheriff's Civil Service examination.

6. The complainant's name appeared on the list of eligible applicants for the position.

7. The complainant passed psychological and physical examinations required by Deputy Sheriff's Civil Service Commission.

8. The complainant had no criminal record at the time of the hearing or at any time relevant to the matters arising in this case.

9. The complainant was certified to the Sheriff's Department as a qualified applicant.

10. On three occasions, the complainant was passed over for employment by the Sheriff's Department.

11. A board of council composed of senior commissioned and non-commissioned members (all white) of the Raleigh County Sheriff's Department and the President of the Deputy Sheriff's Association reviewed the applications and background of prospective employees.

12. The former Sheriff, Okey Mills, testified that the complainant was rejected because of the following reasons:

(a) the complainant had a bad temper

(b) he, the Sheriff, wanted to get a new list of eligibles

(c) he, the Sheriff, didn't want to appear as a tyrant and go against the Board's recommendation.

13. A board of council of Commissioned and non--commissioned officers of the Sheriff's Department made allegations of character defects and of activities of the complainant.

14. The board or council of commissioned and non--commissioned officers of the Sheriff's department made recommendation to the Sheriff that the complainant not be hired as a deputy sheriff for Raleigh County.

15. The recommendation not to hire the complainant was based; background investigations performed by four members of the Sheriff's Department.

16. The background investigations which were conducted by the members of the board followed no formal or prescribed procedure.

17. The number and content of the background investigations conducted by the board of non-commissioned and commissioned officers was left to the discretion of investigating officers.

18. The ultimate decision to hire or to reject the complainant for employment was made by then Sheriff Okey A. Mills.

19. During a pre-employment interview, nor at any other time was the complainant given an opportunity to explain or rebut any of the allegations regarding his character or reputation.

20. The complainant was not notified of his rejection for employment by an official communication from the Sheriff's Department

21. A new examination was given for Deputy Sheriffs while an eligible candidate remained on the existing list.

22. The Department sought new applicants for the position and a new test for applicants was administered.

23. Complainant learned of his rejection by the Sheriffs' Department in October, 1976.

24. The filing of the complaint in this matter on December 2, 1976, was within 90 days of the complainant's discovery of his rejection which occurred on or about October 27, 1976.

25. During the tax year 1976, the complainant earned \$6,558.00.

26. During the tax year 1976, the starting salary for Raleigh County Deputy Sheriff was \$591.00 per month, or \$7,092.00 per annum.

27. The Raleigh County Deputy Sheriff's starting salary for 1976 exceeded the reported income by \$534.00 for 1976 by complainant.

28. In 1976, Raleigh County Deputy Sheriffs received health insurance benefits in addition to salary.

29. In 1976, complainant received no health insurance benefit as an incident of his employment.

30. In 1977 and subsequent years, complainant's reported income exceeded the salary figures then current for the Raleigh County Sheriff's Department.

31. Complainant has at all times relevant to this matter made reasonable and diligent efforts to mitigate his damages.

32. The complainant had to seek assistance from the W. Va. Department of Welfare in the form of food stamps to supplement his income.

33. The complainant was depressed, was unable to sleep peacefully, felt unwanted and not qualified for anything, and was emotionally "down, as a result of his rejection for the position of Deputy Sheriff.

CONCLUSIONS OF LAW

The hearing examiner, having heard the evidence and having reviewed the exhibits filed at the hearing, hereby makes the following conclusions of law:

1. At all times referred to herein, respondent Raleigh county Sheriff's Department has been an employer within the meaning of Section 3(d), Article 11, Chapter 5 of the Code of West Virginia.

2. At all times relevant to this matter, the complainant, Jonathan Hashimura was a citizen and resident of the State of West Virginia and of Raleigh County, and is a person within the meaning of the West Virginia Human Rights Act of W.Va. Code § 5-11-3(a).

3. On October 27, 1975, the complainant learned of his rejection for employment by the respondent, and on December 2, 1975, filed a verified complaint alleging that the respondent had engaged in illegal practices in violation of the West Virginia Human Rights Act. W. Va. Code § 5-11-9.

4. The complaint in this matter was timely filed within 90 days of an alleged act of discrimination.

5. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Section 8, 9 and 10, Article 11, Chapter 5 of the Code of West Virginia.

6. The complainant has met his burden of proof in establishing that he was denied employment with the respondent because of his ancestry in violation of the appropriate provisions of the West Virginia Human Rights Act. (5-11-9).

W.Va. Code § 5-11-9 places the burden on the complainant to show that he or she was a victim of illegal discrimination because he ~~was~~ a member of a class protected under the Act. In general, a prima facie case of discrimination against a member of a protected class can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evi-

dence. McDonnell Douglas Corporation v. Green, 93 S.Ct. 1817 (1973); Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., ___ W. Va. ___, 329 S.E. 2d 77 (1985).

Under the McDonnell Douglas case the complainant establishes by inference a prima facie case showing discrimination in hiring if he or she proves: (a) the complainant belong to a protected class; (b) the complainant applied for and was qualified for the job for which the employer was seeking applicants; (c) that despite his/her overall qualifications the complainant was rejected for the job; and (d) that after the complainant's rejection the job remained open and the employer continued to seek applications from persons of complainant's qualifications. However, as the West Virginia Supreme Court of Appeals recently noted, the requirements of the McDonnell Douglas prima facie case are not inflexible and must be tailored to each factual situation. State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., supra.

If the complainant establishes a prima facie case under McDonnell Douglas, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for its actions. If the respondent articulates such a reason, the complainant then assumes the burden of showing that the reason given is pretextual in nature. McDonnell Douglas Corp., supra; & Hochstadt*. It is sufficient if the respondent's evidence raises a genuine issue of fact as to whether or not it discriminated illegally against the complainant. Texas Department of Community Affairs v. Burdine, supra, 101 S. Ct. at 1094; Furnco Construction v. Waters, 438 U.S. 567, 98 S. Ct. 2943 (1978); Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d at 535; State ex rel. State of West Virginia Human Rights Commis-

* 425 F.Supp. 318 (D. Mass. 1978)

sion v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d at 86.

If the employer articulates a legitimate nondiscriminatory reason for its actions, the complainant may still prevail by persuading the hearing examiner that the discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is a pretext and unworthy of credence. McDonnell Douglas Corp. v. Green, supra, 93 S. Ct. 1825 (1973); Texas Department of Community Affairs v. Burdine, 101 S. Ct. at 1095; United States Postal Service v. Aikens, 103 S. Ct. 1478 (1983); State ex rel. State of West Virginia Human Rights Commission vs. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d at 87.

Pretext can be shown in several ways: By the respondent's actual treatment of the complainant compared with the respondent's actual treatment of employees in like situations, by the treatment of complainant in particular; by the respondent's reaction to complainant's civil rights activities; and by the respondent's general policy and practice regarding minority employment. Williams v. Boorstin, 663 F2d 109, 117 (C.D.C. 1980); McDonnell Douglas Corp., supra, at 804.

In the subject case, the complainant's burden of proof for his prima facie case was met by showing through competent evidence that he was (1) a member of a protected class under the Act; (2) that he was qualified for the position which he sought; (3) that he was rejected for employment in the position; and (4) that the respondent continued to solicit applicants for the position following the rejection of the complaint.

The former Sheriff articulated three distinct and contradictory reasons for the rejection of the complainant for employment as a Deputy Sheriff. These reasons included recommendations by a selection board based upon subjective and unsubstantiated allegations of violent temper; or the expiration of two years following the administration of the qualifying test;

or the passing over of the complainant to secure a new list of eligibles. Each and every one of these reasons in my opinion is pretextual.

In my opinion, the rejection of the complainant was consistent with the past pattern practice of under-utilization of qualified minorities.

7. The complainant is entitled to back pay in an amount of \$534.00. The complainant indicated he was no longer interested in being a deputy sheriff in view of having a good job at the present. Therefore, this sum represents the difference in his earnings for the year 1976 and that of a deputy sheriff for the same year.

Once a complainant has proven illegal practices, the Commission is empowered to award such relief as will effectuate the purposes of the Act, including back pay, damages, interest and such other relief as is deemed appropriate.

8. The complainant is entitled to compensatory damages in the amount of Ten Thousand Dollars (\$10,000.00) and punitive damages in the amount of Five Thousand Dollars (\$5,000.00).

Complainant clearly has a right to compensatory damages for the depression, humiliation, embarrassment, emotional distress, loss of sleep and loss of personal dignity suffered as a result of respondent's unlawful acts. State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d at 87; Pearlman Realty v. W.Va. HRC., 161 W. Va. 1, 239 S.E.2d 145 (1977). In his case, complainant was passed over for employment, given neither opportunity to rebut nor dispute allegations made against his character and was not informed of the adverse employment decision until many months following the events. The respondent employed purely subjective criteria in rejecting him for employment as a pretext for their true motivation, discrimination, based on ancestry.

In view of these facts, an award of punitive damages is justified as well. As the West Virginia Supreme Court of Appeals held in Addair v. Huffman, 195 S.E.2d 739 (1973), where there is intentional rather than merely negligent disregard of a law designed to protect the public against a particular abuse, and where such intentional disregard of the law permits injury from the exact abuse sought to be avoided, punitive damages may be assessed in addition to compensatory damages.

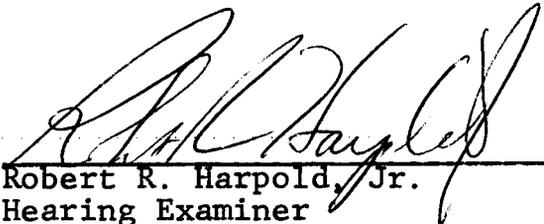
9. Prejudgment interest shall be awarded at a rate of Six Percent (6%) per annum for all monies up to January 22, 1985 and at the rate of Ten Percent (10%) per annum thereafter.

The authority to make an award of prejudgment interest "reflects an appropriate exercise" of the Commission's "authority to fashion relief which makes whole the injured party." Parsons v. Kaiser Aluminum and Chemical Corporation, 727 F.2d 473, 478 (5th Cir. 1974) cert. den., 104 S. Ct. 3516.

Prejudgment interest also has sound basis in recent West Virginia law, having been awarded for reasons similar to those enunciated by the federal courts. For example, in Kirk v. Pineville Mobile Homes, Inc., ___ W.Va. ___, 310 S.E. 2d 210 (1983), the Court held that "...prejudgment interest must be permitted in addition to regular damages to fully compensate the injured party for his losses." 310 S.E.2d at 212. In Bond v. City of Huntington, ___ Va. ___, 276 S.E.2d 539 (1981), the Court ruled that "where there is an ascertainable pecuniary loss, prejudgment interest is to fully compensate the injured party for the loss of the use of funds that have been expended." 276 S.E.2d at 548.

Application of prejudgment interest was recently clarified in Bell v. Miland Mutual Insurance Co., ___ S.E.2d ___ (W. Va. 1985) in which the Court held that interest accruing prior to July 5, 1981, (the effective date of the statute) is calculated at a maximum rate of six percent (6%), and interest accruing after that date is calculated at a maximum rate of ten percent (10%).

10. Attorney fees are denied in view of the fact that the complainant was represented by the Attorney General's Office.



Robert R. Harpold, Jr.
Hearing Examiner
West Virginia Human Rights
Commission

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

JONATHAN HASHIMURA

Complainant

vs:

CASE NO. EAN-189-77

RALEIGH COUNTY SHERIFF'S
DEPARTMENT

1/23/77

Respondent

ORDER

Pursuant to the attached Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. The respondent, Raleigh County Sheriff's Department is hereby permanently Ordered to cease and desist from engaging in any actions which deny full and equal rights to any individual or otherwise to discriminate against such individuals on the basis of race or color or ancestry with respect to the compensation, hiring, tenure, terms, conditions or privileges of employment.

2. The respondent Raleigh County Sheriff's Department shall pay, no later than thirty days from entry of this order, a sum in the amount of Five Hundred and Thirty-Four Dollars (\$534.00) for back pay, for the year of 1976, to complainant.

3. The respondent, Raleigh County Sheriff's Department, shall pay, no later than thirty days from entry of the order, a sum in the amount of Ten Thousand Dollars (\$10,000.00) for compensatory damages, to the complainant as compensation for his humiliation, embarrassment, emotional distress and loss of personal dignity.

4. The respondent, Raleigh County Sheriff's Department, shall pay, no later than thirty days from entry of

this order, a sum in the amount of Five Thousand Dollars (\$5,000.00) for punitive damages, to the complainant.

5. The respondent Raleigh County Sheriff's Department shall further pay prejudgment interest thereon calculated from the date of discrimination, and according to applicable statute, at the statutory rates of interest, to the complainant.

6. Payment of said amounts is to be made to the complainant by sending a check to the West Virginia Human Rights Commission, made payable to the order of Jonathan Hashimura. The Commission shall then forward the check to the complainant.

7. The respondent shall post a copy of this order on all bulletin boards in its premises in Beckley, West Virginia.

8. The respondent shall institute within six (6) months of this order, and thereafter maintain, an affirmative action program which shall be approved by the West Virginia Human Rights Commission.

9. The respondent shall comply with Commission's Order, as it relates to the monetary award, within thirty (30) days from date of entry.

Chairperson, West Virginia Human
Rights Commission