



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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October 7, 1985

ARCH A. MOORE, JR.
Governor

Charles Garlow
Assistant Attorney General
1204 Kanawha Blvd.
Charleston, WV 25301

James Williams, Esq.
Ronesome, Price & Williams
Kanawha Valley Bldg.
Charleston, WV 25301

RE: ES-121-80

Dear Counsel:

Herewith, please find the Order of the WV Human Rights Commission in the case of Rudolph A. Raynes v. Putnam County Board of Education.

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, West Virginia, 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 thirty (30) days, the Order is deemed final.

Sincerely yours,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/mst

Enclosure

cc: Rudolph Raynes

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RUDOLPH A. RAYNES,

Complainant,

v.

DOCKET NO. ES-121-80

PUTNAM COUNTY BOARD OF
EDUCATION

Respondent.

ORDER

On the 19th day of July, 1985, the Commission reviewed Hearing Examiner Victor A. Barone's Findings of Fact and Conclusions of Law. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

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 except to the extent that the West Virginia Human Rights Commission ORDERS the following paragraph on pages 13-14 deleted so that that paragraph is not a part of the Commission's Order:

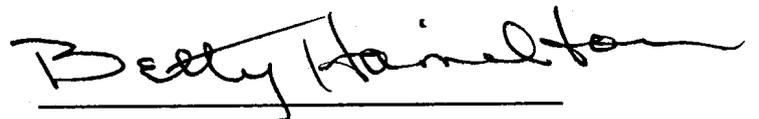
"Third, to assume that Harriet Cartmill would have prevailed in a school system grievance requires us to indulge in a great deal of speculation. If the Putnam County Board of Education had selected complainant for the girls basketball position and then had to defend its choice, might it not have emphasized complainant's years of head coaching experience (compared to Harriet Cartmill's lack of experience)? Would it not have attempted to minimize the distance between Poca Middle School and Poca High School, perhaps pointing out that complainant had already functioned satisfactorily as an off-staff assistant coach? Perhaps it would have cited some examples of the policy against off-staff coaches not being iron-clad, which is exactly

what complainant intimated in his testimony. We do not know the answers to these questions, but the point is that it is difficult to predict the outcome of a hypothetical grievance proceeding without even knowing what the evidence would have been."

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.

Entered this 13th day of August, 1985.

Respectfully submitted,

A handwritten signature in cursive script that reads "Betty Hamilton". The signature is written in black ink and is positioned above a horizontal line.

BETTY HAMILTON
VICE CHAIRMAN
WEST VIRGINIA HUMAN RIGHTS
COMMISSION

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

RECEIVED

JUN - 6 1985

W.V. HUMAN RIGHTS COMM.
[Signature]

RUDOLPH A. RAYNES,
Complainant,

vs.

CASE NO. ES 121-80

PUTNAM COUNTY BOARD
OF EDUCATION,

Respondent.

HEARING EXAMINER'S PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER.

INTRODUCTION

A public hearing was held in this case on April 3 and April 4, 1985, at the Putnam County Courthouse, Winfield, West Virginia. Complainant was represented by counsel, Charles Garlow, Assistant Attorney General. Respondent was represented by counsel, James E. Williams.

Before enumerating proposed findings and conclusions, the Hearing Examiner considers it appropriate to recite the circumstances of a motion made by complainant prior to the hearing and the ruling made thereon.

The original complaint in this case, filed in 1979, alleged sex discrimination; specifically, that complainant

had been denied a coaching position (as head coach of the Poca High School girls basketball team) because he was a male.

On March 28, 1985, approximately one week before the public hearing, complainant moved for leave to amend his complaint to add an additional charge; i.e., that respondent had engaged in and was continuing to engage in retaliatory action against complainant because he filed the original complaint. As complainant's motion correctly pointed out, retaliation for filing a Human Rights complaint is itself an unlawful discriminatory practice under W.Va. Code §5-11-9, subdivision (i).

Complainant's motion was taken up at the public hearing prior to the taking of evidence on the original complaint. After hearing the argument of counsel, the Hearing Examiner denied the motion. It was and is the Hearing Examiner's opinion that the retaliation charge is a new and separate claim which should go through the usual investigative procedures of the Commission before being heard. Indeed, the Hearing Examiner doubts that said charge could legally be heard in a public hearing without a prior investigation and finding of probable cause. In any event, complainant is not prejudiced by this ruling, because if his new charge is timely filed, his rights are preserved and the claim will be heard in due time. On the other hand, it would have been prejudicial to require respondent to defend against a new claim which it had received only 4 or 5 days prior to the hearing.

PROPOSED FINDINGS OF FACT

1. The complainant, Rudolph A. Raynes, is a white male who has been employed as a teacher in the Putnam County school system since 1973. He is certified by the State Board of Education with specializations in Physical Education and Social Studies (Respondent's Exhibit 3).

2. In Putnam County, complainant taught at Buffalo High School from 1973 to 1978. He served as head coach of the Buffalo High School boys varsity basketball team during that period. His "won-lost" record was 70-39.

3. After leaving Buffalo, complainant became a "transient substitute" teacher based at Poca Middle School in the 1978-79 school year, and the following year became permanently assigned to Poca Middle School where he has remained to date.

4. Complainant has not been a head basketball coach since leaving Buffalo High School in 1978. During one subsequent school year, he did serve as an unpaid assistant coach of the boys varsity basketball team at Poca High School. This was at the invitation of Allen Osborne, then head coach at the latter school. There is conflicting testimony on exactly what year complainant served in his unpaid capacity but the parties stipulated that it was the 1978-79 school year. (One witness said it was 1979-80).

5. Poca Middle School is located about a mile from Poca High School, only a few minutes away by car. During the

year that complainant served as an unpaid assistant coach at Poca High School while teaching at the middle school, he performed all of the tasks that a paid assistant would do and there is no dispute that his volunteer coaching services were satisfactory.

6. There is no dispute that complainant is qualified to serve as a head coach of either a boys or girls high school varsity basketball team in Putnam County and that he was so qualified in the period 1978-1980.

7. Although it is not the common practice, it is permissible in Putnam County (and other school systems) to teach at one school and coach at another. Respondent submitted a statistical exhibit (Respondent's Exhibit 6) indicating that in the school years 1977-78, 1978-79 and 1979-80, of a total of 171 coaching positions filled in those years, 161 were filled by teachers at the same school. On the other hand, as noted above, complainant himself served as an assistant coach at Poca High School while teaching at Poca Middle School, and also served as the paid "official" tennis coach at Poca High School the same year. Further, there was testimony that in 1983, of the 4 coaches of the boys varsity basketball team at Poca High School, only the head coach (Osborne) taught there; his 3 assistants were from other schools -- referred to hereafter as "off-staff" coaches.

8. The respondent Board of Education does not have a written policy concerning the general subject of off-staff coaching or specific written criteria as to when it is permissible to

have off-staff coaches at a high school. However, from the testimony of numerous witnesses on the subject, the Board's unwritten policy on the subject is as follows:

(a) It is desirable or preferable that a coach be hired from the faculty at the same school. This is so for several reasons, including avoidance of schedule conflicts and enhancement of relationships with players, other faculty and administration, and parents, among other things.

(b) The Board desires that off-staff coaches be used only if no teacher on the faculty can be found to fill the position. Principals are supposed to poll their faculty and otherwise "recruit" to fill the coaching position from within. If these efforts fail, then the position can be given to those interested from other schools in the county. Witnesses for the Board stated or implied that hiring off-staff invariably was necessary only in regard to vacancies in so-called "minor" sports which were sometimes difficult to fill. There were differences of opinion even among respondent's witnesses as to the distinction between a "major" and "minor" sport. All seemed to agree that football and basketball, at least, are universally considered as major sports. Here it is noted that complainant pointed out several examples of off-staff coaches in the unquestionably major sports; e.g., the 3 assistant basketball coaches at Poca High School in 1983, and a football coach at Buffalo High School.

(c) Although the Board's unwritten policy is as stated

above, the manner of implementation of the policy seems to be left up to the principal at each school. There is no system of oversight to assure that inhouse faculty have "first refusal" on filling coaching vacancies at each school. Principals have discretion as to how they inform their faculties about vacancies and as to the extent of their inhouse recruiting efforts. There is no official "posting" or advertising of coaching vacancies. Principals might circulate informal bulletins or memos within their schools, or the vacancy may become known simply by word-of-mouth. The Board central office assumes, however, that principals will thoroughly poll their faculties before looking off-staff. Complainant testified that while he was at Buffalo High School, he was not approached about or offered a particular position that later was given to an off-staff coach.

9. By custom and practice, if not written policy, principals in Putnam County have considerable input into the hiring of coaches. They conduct interviews of candidates, make coaching assignments (subject to formal approval by the Board) and may recommend or not recommend retention of existing coaches. As already noted, they may informally recruit candidates for positions that lack for applicants. Although principals cannot finally and formally hire a coach, their recommendations carry great weight and they serve in effect as "hiring agents" for the Board, albeit always subject to formal action by the Board. There seems to be no dispute that in 1979, the principal of

Poca High School was the person who would receive applications for coaching positions at that school and make initial hiring decisions on them.

10. Early in 1979 (while classified as a transient substitute) and continuing into the summer of that year, complainant applied for a permanent teaching position at Poca Middle School and also for any varsity basketball head coaching position that might come open in the county. Complainant also specifically requested to be considered for the head coaching position of the girls varsity basketball team at Poca High School (Complainant's Exhibits 3, 4, 5).

11. There is no dispute that complainant's written and oral statements in 1979 constituted an application for the position of head coach of the girls varsity basketball team at Poca High School in accordance with the custom and practice in Putnam County. Complainant on or about July 9, 1979, addressed and mailed a letter to Harold Carr, then principal of Poca High School, in which letter complainant specifically requested that coaching position. (Complainant's Exhibit 5). Mr. Carr denied receiving the letter.

12. There is no dispute that in July of 1979, complainant and Carr happened to meet at an IGA food store in Eleanor (Putnam County) while shopping. Complainant initiated a conversation with Carr and specifically asked about the girls basketball position. There is a conflict in the testimony about what ensued.

The Hearing Examiner finds the more credible testimony to be that of complainant as corroborated by his father who was also present at the IGA store on that occasion, and who testified at the hearing. The gist of that testimony is that Carr said the position had to be filled by a female and that complainant would not be considered because he was a male.

13. Later in July, or in August, 1979, complainant learned from another Board official that he in fact would not be appointed to the girls basketball position. Complainant went to Carr's office at Poca High School to discuss the matter. There is a dispute between counsel as to whether the record reflects a denial by Carr of complainant's testimony about this second conversation. Giving respondent the benefit of the doubt on this point, and assuming, arguendo, that Carr denied the allegations, the Hearing Examiner nevertheless finds that complainant's testimony is more credible. The gist of that testimony again is that Carr overtly admitted hiring a female teacher for the position, not because she was better qualified, but because she was female, and he, Carr, wanted a female for the position. It is noted that complainant said a third party was present at that conversation (a Mr. Smith). This third party was not called to testify nor was any mention made at the hearing of his whereabouts or availability.

14. A female, Harriet Cartmill, was in fact given the coaching assignment for the girls varsity basketball team at

Poca High School for the school year 1979-80. This assignment was made upon Carr's recommendation. Cartmill also applied for and received a permanent teaching assignment as a business education teacher at Poca High School in the same year, so she was an "on-staff" coach. She was interviewed by both Carr and James Douglas, who was then Assistant Superintendent for personnel. He is now Assistant Superintendent for curriculum. Douglas testified as a witness for respondent. Harriet Cartmill apparently did not have previous coaching experience but she was certified in Physical Education, and complainant does not take issue with her qualifications for the coaching assignment she received. Harriet Cartmill did not appear as a witness.

15. Respondent and principal Carr maintain that the conversation at the IGA store in July of 1979 is of no legal significance because Carr was "on vacation" from mid-June to mid-August, was not being paid by the Board of Education during that period, and therefore was not an agent or official of the Board at that time. He later testified, however, that he would interview job candidates during his vacation periods when requested by the Board. The Hearing Examiner finds that Carr had not temporarily ceased to be an agent of the Board merely because he happened not to be receiving a paycheck in July of 1979. Further, there is no dispute about his capacity during the second conversation which took place at Poca High School when he told complainant why he had selected Cartmill for the

position.

16. Although the Board's policy regarding off-staff coaches is unwritten, and not closely supervised by the Board, there is no dispute that one's chances of getting a coaching position are enhanced if he or she is a teacher at the same school where the coaching vacancy exists. Complainant agrees that in hiring, the placement of teachers comes first. Coaching is an extracurricular activity; coaching vacancies are filled from the ranks of teachers.

17. Since being denied the coaching position in question, complainant has applied for numerous coaching positions at high schools in other counties, without success. For at least the last two school years, he has not applied for a teaching position at any high school in Putnam County. The record is not clear as to the extent of his efforts to obtain a teaching position at a high school in Putnam County in the school years between 1979-80 and 1983-84. Complainant indicates that he may have filled out a questionnaire once, which he considers to be an application, and he has talked to people about teaching positions in the county. In essence, he explains his lack of application for other teaching positions in Putnam County in recent years by saying that it is no use applying because he is out of favor with the county school administration. This record is also not clear as to complainant's efforts to obtain other coaching positions in Putnam County while continuing

to teach at Poca Middle School.

18. Teaching positions, as distinguished from coaching positions, are advertised by vacancy bulletins and a telephone "hot line" operated by the central office, among other ways. The names of those who express interest in response to a vacancy bulletin are placed on a job application sheet. Assistant Superintendent Douglas testified that he did not recall that complainant had responded to a teaching vacancy bulletin since being denied the job in question in 1979. Another witness for the respondent, James McGehee, testified that a vacancy bulletin was circulated in July, 1984, advertising a vacancy in physical education at Poca High School for the 1984-85 school year (Respondent's Exhibit 8). Complainant was qualified for the position but did not respond. McGehee testified that complainant would have received that teaching position if he had applied for it.

19. In 1979, a coaching position such as the one complainant requested would pay about \$500.00 per year. The same position could pay as much as \$1,500 per year now.

DECISION, PROPOSED CONCLUSIONS AND ORDER

This case involves a type of discrimination that supposedly is decreasing in incidence; i.e., an overt admission that a hiring decision was based on impermissible grounds. Although respondent denied at the hearing that such admissions occurred, its primary defense is that even if sex discrimination was

the reason for the principal's decision, complainant still would not have received the job in question because of the Board's unwritten policy about off-staff coaches. Complainant's counsel describes respondent's defense as a "pretext" theory, but strictly speaking, it is not accurate to call it a pretext. The Board's policy about off-staff coaches was not the reason given to complainant at the time the vacancy was filled. The only reason given to complainant at the time was, in effect, that he was of the wrong sex. The principal, Carr, did not mention the fact that complainant taught at Poca Middle School and that therefore he could not coach at the high school. It does not appear that the Board's unwritten policy was given as a justification for the hiring decision until after the complainant took legal action in the form of a grievance within the school system and by means of this human rights complaint.

At any rate, by whatever name, respondent's defense is that complainant would not have received the job anyway. In closing argument, respondent's counsel stated that if the position had been given to complainant, the female teacher, Harriet Cartmill would have had grounds to file a grievance in which she would have prevailed against the school board.

At first glance, this argument is persuasive because it casts the respondent in the role of an employer who will be attacked no matter what it does. There are several answers to this argument.

First, the prohibition against sex discrimination is written into law as clear public policy. The respondent's policy on off-staff coaches is, on this record, only an unwritten preference which may or may not be enforced to the letter.

Second, although respondent in its proposed conclusions hints at but does not argue "business necessity", per se, we know that it is not a business necessity that coaches be assigned only from inhouse faculty. Granted, the use of off-staff coaches is the exception rather than the rule, but it has occurred a number of times, including the instances of complainant himself serving as tennis coach and assistant basketball coach at Poca High School.

Third, to assume that Harriet Cartmill would have prevailed in a school system grievance requires us to indulge in a great deal of speculation. If the Putnam County Board of Education had selected complainant for the girls basketball position and then had to defend its choice, might it not have emphasized complainant's years of head coaching experience (compared to Harriet Cartmill's lack of experience)? Would it not have attempted to minimize the distance between Poca Middle School and Poca High School, perhaps pointing out that complainant had already functioned satisfactorily as an off-staff assistant coach? Perhaps it would have cited some examples of the policy against off-staff coaches not being iron-clad, which is exactly what complainant intimated in his testimony. We do not know the answers to these questions, but the

point is that it is difficult to predict the outcome of a hypothetical grievance proceeding without even knowing what the evidence would have been.

In light of the above analysis, we do not consider it necessary to cite extensive authority, but we note the following applicable precedents from the Commission's own administrative decisions: Baker v. Dunbar Junior High School and Kanawha County Board of Education, ES 96-73, and Thaw v. Charleston Area Medical Center. In the latter case, no discrimination was found, but the Commission acknowledged and cited authority that a statutory violation may be found even though the victim of the discrimination would not have been hired anyway.

The complainant here is entitled to relief. In his proposed findings and conclusions he requests as damages the amount he would have earned during the last 6 years as a coach (\$6,000.00) and attorney fees in an amount which his counsel will submit to the Commission. He does not seek damages for emotional harm and does not ask that the respondent be ordered to make a coaching position available to him.

As to monetary damages, we agree that complainant is at least entitled to \$500.00, the additional amount he would have earned in the 1979-80 school year. Damages for the ensuing years are more difficult to justify. (There has been a delay of 5 1/2 years between the filing of the complaint and the public hearing. This delay cannot be blamed on either party.) Complainant did testify

that he tried to find teaching-coaching positions in other counties, but he did not pursue the obvious step that unquestionably would have enhanced his chances of getting a coaching position in Putnam County; i.e., becoming a teacher at a high school in the county. In 1984, for example, he passed up a vacancy in physical education at Poca High School. Further, he does not appear to have affirmatively pursued other coaching positions in Putnam County.

Complainant submitted no evidence on what he would have earned in any of the positions that he sought in other counties. The Hearing Examiner can take official notice of the fact that teaching salaries are not equal in all counties. Therefore, if complainant had obtained an out-of-county job he might have made more or less than his actual salaries in Putnam County over the last five years.

Moreover, on this record, it cannot be concluded that attempts by complainant to get teaching or coaching positions at other high schools in Putnam County would have been fruitless. Taking complainant's evidence at face value, he was "out of favor" with one principal at one high school in Putnam County, but there is no evidence that the school board or central office administration would have arbitrarily denied him teaching assignments. If this had occurred, he presumably would have had remedies within the school system and ultimately the courts. Complainant's retaliation charge as stated in his amended complaint says only that Harold Carr threatened to prevent

him from getting any other coaching assignments. If complainant pursues his retaliation charge, he may conceivably prove a system-wide blackballing and then be entitled to additional damages in the form of back pay for the years 1980-81 to date.

In sum, the Hearing Examiner does not find that damages beyond the \$500.00 for the 1979-80 school year are warranted in this proceeding.

As previously noted, complainant in his proposed conclusions has not asked that respondent be compelled to make a coaching position available to him. The Hearing Examiner has also carefully checked his notes of the final arguments by counsel at the conclusion of the evidence and can find no such request by complainant's counsel. The absence of a request for such relief raises a question as to whether complainant is presently interested in or desires a coaching position in Putnam County. In any event, relief of that nature will be awarded as hereafter specified.

The Hearing Examiner's Proposed Conclusions and Order are as follows:

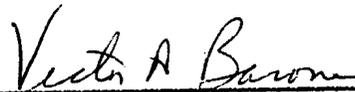
1. Complainant was denied the coaching position he sought for the 1979-80 school year because of an unlawful discriminatory practice; i.e., because he is a male.
2. Respondent shall cease and desist from the unlawful discriminatory practice of denying coaching positions to otherwise qualified applicants because of sex.
3. Respondent shall pay to complainant the sum of \$500.00

with interest from July 1, 1980, as back pay for the coaching position which complainant applied for in 1979.

4. If complainant still desires a coaching position, he shall so communicate to the Commission and respondent, and respondent shall thereupon offer to him the first available high school coaching position equivalent to the one wrongfully denied him in 1979, provided that he is otherwise qualified for the position and the daily schedules at the respective schools are compatible with the duties of teaching and coaching.

5. The respondent shall report to the Commission periodically at Commission's request as to compliance with this decision and order.

Dated this 23rd day of May, 1985.



Victor A. Barone
Hearing Examiner

CHARLES E. HURT
JOHN B. CARRICO
VICTOR A. BARONE

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June 5, 1985

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W.V. HUMAN RIGHTS COMM.
[Signature]

Howard D. Kenney, Executive Director
West Virginia Human Rights Commission
Professional Building
1036 Quarrier Street
Charleston, WV 25301

Re: Raynes v. Putnam
County Board of
Education; HRC
Docket No. ES-121-80

Dear Mr. Kenney:

Enclosed herewith are my recommended findings of fact, conclusions of law, decision and order in the above-referenced case. These recommendations have been approved by the Chief Administrative Law Judge, Sam R. Harshbarger.

Very truly yours,

Victor A. Barone
Victor A. Barone

July

cc: Charles Garlow, Esquire
James E. Williams, Esquire