



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 3/31/04.

**STATE OF ILLINOIS**  
**HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>MARY LOU CASTANEDA,</b>	)	
	)	<b>CHARGE: 1995CF1662</b>
	)	<b>EEOC NO:</b>
<b>Complainant,</b>	)	
	)	<b>ALS NO: 9098</b>
	)	
<b>and</b>	)	
<b>CHICAGO PARK DISTRICT,</b>	)	
	)	
<b>Respondent.</b>		

**RECOMMENDED ORDER AND DECISION**

On April 18, 2002, the Illinois Human Rights Commission reversed the previous finding against Complainant, recommended by Administrative Law Judge McGuire, as against the manifest weight of the evidence and remanded the matter to this Administrative Law Judge<sup>1</sup> for an assessment of damages.

When this matter was previously tried, evidence was presented as to damages. Complainant filed a Memorandum as to Damages and a Motion for Attorney's Fees and Costs. Respondent, The Chicago Park District (Park District) filed a Response to both motions and Complainant filed a Reply as to Damages and Fees. This matter is ready for decision.

*Findings of Fact*

1. The Illinois Human Rights Commission found that Complainant presented a *prima facie* case of race and age discrimination and remanded this matter in

<sup>1</sup> Judge McGuire is no longer with the Commission.

order to determine Complainant's damages. (*Castaneda & Chicago Park District, 2002 ILHUM LEXIS 43 (August 18, 2002).*)

2. Castaneda began working for the Park District on July 18, 1988 as a typist file clerk in the Engineering Department. Castaneda's job title was changed from typist file clerk to Clerk I when the job titles of typist file clerk and junior clerk were consolidated into the Clerk I job title.
3. Castaneda was a member of Union Local 46.
4. In December 1990, Castaneda filed a union grievance complaining that she was performing data entry job duties that were not a part of her job description.
5. The grievance remained unresolved, and then Castaneda was laid off on July 31, 1994. At that time, she was working in the Purchasing Department.
6. In 1994, 25 of 33 people in positions eligible for layoff were laid off. Complainant was 8<sup>th</sup> in seniority, so if the layoff had been conducted in the order specified in the union contract (*Exhibit 56*), Complainant would have retained her position.
7. Complainant's grievance was finally resolved via a letter dated August 18, 1994; she was paid \$14,503.42.
8. Persons in whose favor these grievances are resolved are routinely "reclassified" into the position for which they were doing the work, retroactive to the date that the grievance was filed. Paula Boost, Felicia Valance and Cecilia Ware were reclassified in this manner.
9. In this case, Castaneda should have been reclassified into a Data Entry Operator position in August 1994 retroactive to the date her grievance was filed.
10. There were 3 Data Entry Positions budgeted in the Purchasing Department in 1994. The salary for two of the positions was \$22,344 annually; the remaining one paid \$22,644 annually.
11. In 1994, only two Data Entry Operator positions were filled; Marge Wilmott and Denise Bauer filled those positions. Bauer was a temporary employee hired through an outside agency. Wilmott died later that year.
12. On June 7, 2002, pursuant to the order in this case that was entered on June 5, 2002, Castaneda filed discovery requests as to damages. Those requests included the salary of Data Entry Operators from 1994 to present. Respondent failed to timely respond to said requests.

13. No Data Entry Operators were laid off in 1993-1994, the layoff that affected Complainant. No Evidence was presented indicating that any Data Entry Operators were laid off between 1994 and the date of the public hearing.
14. From August 1, 1994 to December 31, 1997, Castaneda earned \$2340.
15. In 1998, Castaneda earned \$5377.
16. In 1999, Castaneda earned \$5356.
17. In 2000, Castaneda earned \$3662.
18. In 2001 Castaneda earned \$3641.

#### Conclusions of Law

1. Complainant is an “aggrieved party” as defined by section 1-103(B) of the Illinois Human Rights Act (Act), 775 ILCS 5/101 et seq. (1999).
2. Respondent is an “employer” as defined by section 2-101 (B) (1) (c) of the Act and is subject to provisions of the Act.
3. The evidence admitted during the public hearing in this matter is sufficient to support the amount of damages and attorney’s fees that is awarded to Complainant below.
4. A prevailing complainant may recover reasonable attorneys' fees that were required to maintain her action.

#### Discussion

#### Damages

Complainant is entitled to a back pay award. Complainant was #8 on the seniority list at Respondent. There were 33 employees eligible for layoff in 1994, but only 25 of them were laid off. Therefore, if Respondent had conducted its layoff appropriately, in order of seniority, Castaneda, being 8<sup>th</sup> highest in seniority, would have

retained her job. (*See, Complainant's Exhibit 3, 56, and Exhibits C, D and E, attached to Complainant's Damages Memorandum*).

Next, the rate of pay at which Complainant will be compensated must be determined. In December of 1990, Castaneda filed a grievance alleging that she had been doing the work of a Data Entry Operator, while her official position, and pay rate, was that of a Clerk I. On August 18, 1994, 2 ½ weeks after her termination, Castaneda received a letter from Respondent stating that the Park District had determined that she had indeed been doing the work of a Data Entry Operator from December 25, 1990 thru her termination date of July 31, 1994, and awarded her \$14,503.42 in settlement.

An employee who wins this type of grievance can be reclassified into that title. When that occurs, the employee is considered to have had that title from the beginning of the period that they were found to have performed those duties. Complainant contends that all employees who are successful after filing such grievances are then reclassified. In support of this contention, Castaneda submitted evidence showing that Paula Boost, Felicia Valance and Cecilia Ware were all reclassified after filing a grievance like Complainant's. Respondent submitted no evidence to the contrary.

Evidence of other employees in whose favor a similar grievance was adjudicated, yet were **not** reclassified, is clearly under the Park District's control, could have been produced with reasonable diligence, and was not equally available to Complainant. Also, a reasonably prudent person would have offered the evidence if he believed the evidence to be in his favor. Further, no reasonable excuse for Respondent's failure to produce this evidence has been offered, and the evidence certainly would not be cumulative. Therefore, this tribunal can, and does, draw a negative inference from Respondent's

failure to produce said evidence. DeBow v. City of East St. Louis, 158 Ill.App.3d 27, 109 Ill.Dec. 827, 510 N.E.2d 895 (5<sup>th</sup> District 1987), Jenkins v. Dominicks Finer Foods, Inc., 288 Ill.App.3d 827, 681 N.E.2d 129, 224 Ill.Dec. 147 (1<sup>st</sup> District 1997). Given this, Respondent's argument that it was not **required** to reclassify those who successfully prosecuted a grievance like Castaneda's is unpersuasive. The evidence indicates that such reclassifications occurred all but automatically. Accordingly, this tribunal finds that Complainant should have been reclassified as a Data Entry Operator. It should be noted that Complainant took the required test for the Data Entry Operator position and passed. (*Tr*, pg. 21, 23).

Additionally, there were available positions in the Purchasing Department at Respondent into which Complainant could have been transferred. Three Data Entry Operator positions were budgeted at Respondent in 1994, but there were only two Data Entry Operators in the Purchasing Department at Respondent: Marge Wilmott and Denise Bauer. (*Tr. Vol. II at 23-24*). Bauer was a temporary employee who had been hired through an agency and was a relative of Darlene Locasio, Castaneda's supervisor in the Purchasing Department. (*Vol. I at 22, Vol. II at 137*).

Additionally, no Data Entry Operators were affected by the layoff that affected Complainant in her Clerk I position. (*Respondent's Exhibit 7C, attached to Complainant's Memorandum As To Damages as Exhibit B*). Also, there was no evidence presented of a layoff that included Data Entry Operators after August 18, 1994. So, if the layoff that affected Clerk I's had been conducted per the union contract, Complainant would have retained her Clerk I position. Then, upon the successful determination of her grievance, Castaneda should have been reclassified as a data entry operator, into the third

1994-budgeted position. Therefore, Complainant would have been making a Data Entry Operator salary as of July 31, 1994 (the date of her layoff), so her backpay award will be calculated accordingly.

Since Complainant was compensated, via settlement, up to August 18, 1994 (the date of the letter notifying Castaneda that her grievance was settled), that date will serve as the start date for the computations here. The salary for the Data Entry Operator position was 22,494 annually<sup>2</sup>. (*Vol. II at 23-24*). So, Castaneda would be entitled to \$202,446 from August 18, 1994 to present (\$22,494 x 9 years). However, this amount must be offset by the amount of money that she actually did earn during this time.

From August 1, 1994 to July 31, 1998, Complainant earned \$5018 from part time jobs. (*Complainant's Exhibit 10, Tr. Vol. II, pg. 139-156*). From July 31, 1998 to December 31, 1998, Complainant earned \$2699. (*Exhibit F, attached to Complainant's motion*). In 1999, Complainant earned \$5356. (*Exhibit G, attached to Complainant's motion*). In 2000, Complainant earned \$3662. (*Exhibit H, attached to Complainant's motion*). In 2001, Complainant earned \$3641. (*Exhibit I, attached to Complainant's motion*). The total that Castaneda has earned since her termination is \$20,376, bringing her back pay award to \$182,070. Complainant will be ordered to submit her 2002 tax return and all pay stubs in that she has received for 2003 to further offset her back pay award.

As to the issue of raises, Complainant requests 4% raises annually. No evidence was presented regarding raises, but Castaneda contends that Respondent failed to produce evidence requested during discovery regarding raises (*Complainant's Memorandum As*

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<sup>2</sup> Two Data Entry Operator positions were budgeted at \$44,688; one position was budgeted for \$22,644. \$22,494 is the average of the three salaries.

*To Damages, pg. 10-11)*<sup>3</sup> and therefore an adverse inference should be drawn and Castaneda should be granted 4% per year. Pursuant to the DeBow and Jenkins cases, *supra*, this tribunal will draw an adverse inference due to Respondent's failure to produce evidence of salaries and raises of Data Entry Operators, but will only grant Complainant 3% raises from 1995 to present.

Also, Castaneda's pension must be restored to the level that it would have been if she had been reclassified into the Data Entry Operator position and had been working in that position, with 3% annual raises, through the date of this Recommended Order and Decision.

A prevailing Complainant is also presumptively entitled to reinstatement to a job lost because of unlawful discrimination. Dewberry and Kraft Foods, Inc., 2001 ILHUM LEXIS 147, (August 29, 2001). In the case at bar, Respondent should be ordered to reinstate Complainant to a Date Entry Operator position. Her pay, benefits and seniority should be the same as they would have been if she had not left Respondent's employ and had been reclassified as a Data Entry Operator.

Finally, there was no evidence offered regarding emotional distress damages (*Complainant's Testimony, Tr. Pg.16-38, 137-159*), so no award will be made on that basis. An award of emotional distress damages requires some evidence of that distress. *See, e.g., Little and Mango Restaurant*, 2002 ILHUM LESIS 123 (September 20, 2002).

## Attorney's Fees

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<sup>3</sup> Respondent does not dispute this allegation.

The proper approach to a motion for attorney's fees is set forth in Clark and Champaign National Bank, 4 Ill. HRC Rep. 193 (1982). Under the Clark approach, the first thing to do is to determine the appropriate hourly rate for the attorney's work. The next step is to determine the number of hours reasonably spent on the case. Finally, it is necessary to decide if any additional adjustments should be made to the award.

Respondent attacks the adequacy of the petition filed by Complainant for Attorney Lonny Ben Ogus's fees in this case, stating that Ogus' rate is too high. Complainant used Ogus's current rate, not the rate in effect at the time the services were rendered. The Respondent argues that, at the very least, the fees should be recoverable at the old, lower rate.

However,

in a case such as this, the complainant's attorney will not receive payment for services rendered for many years. There is a loss of the opportunity to use the money during that time period, as well as a diminution of the value of that money due to inflation. Complainant may use current rates to make up for those differences.

Smith and Professional Service Industries, 1993 ILHUM LEXIS 257 (May 7, 1993).

Consequently, Mr. Ogus will be compensated at the rate of \$350 per hour. Respondent does not dispute attorney Diane Blair's or the law clerk hourly rate.

Next, Respondent objects to the number of hours spent on the case, stating that the entries are vague. Upon review, this tribunal finds that there is no way to determine the reasonableness of the following telephone calls since the subject matter that was discussed is not indicated: Ogus- 9/21/94, 11/23/94, 10/6/95, 10/22/96, 11/4/96, 3/25/97, 4/9/97, 9/29/98, 2/24/99, 10/29/99, 1/11/00, 4/5/00, 4/10/00, 8/9/01, 10/31/01, 11/5/01, 1/3/02 thru 4/12/02. Law Clerks- 1/9/96, 3/3/97, 3/20/00. When considering attorney's

fee awards, doubts are to be resolved in favor of the respondent. Lieber and Southern Illinois University Board of Trustees, 34 Ill.HRC Rep. 206 (1987). Consequently, these entries will be disregarded.

Next, the total hours must be cut down to reflect Complainant's limited success in this case; Castaneda was unsuccessful in her retaliation claim. However, Complainant succeeded on the core of her case, the race and age claim. Still, a 20% reduction would be appropriate under these circumstances. Complainant should be awarded attorney's fees for 80% of the work done in this case. See, Hilton & State of Illinois Department of Central Management Services, Bureau of Property, 2000 ILHUM LEXIS 79, (September 8, 2000).

Next, Complainant requests reimbursement in the total amount of \$1506.49 for costs. (*Exhibit G, attached to Complainant's Motion for Attorneys Fees and Costs*). Contained in the amount requested for costs, Complainant has requested reimbursement in the amount of \$690.43 for photocopying charges. Photocopying costs are considered expenses that are normally included in office overhead and therefore encompassed within the hourly rate charged by the firm and not compensable, Kaiser v. MEPC American Properties, Inc., 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1<sup>st</sup> District 1987).

#### Recommendation

Based upon the foregoing, it is recommended that an order be entered awarding Complainant the following relief:

- a. That Respondent reinstate Complainant to her former position, or to a substantially equivalent position, at the rate of pay and with the seniority and benefits (including pension benefits) she would have had if she had not left Respondent's employ;

- b. That Respondent pay to Complainant the sum of \$188,640.60 for lost back pay<sup>4</sup>;
- c. Complainant is ordered to submit her 2002 tax returns and all 2003 pay stubs. The amount Complainant earned in 2002 and thus far in 2003 must be deducted from the above backpay award;
- d. That Respondent pay to Complainant prejudgment interest on the back pay award, such interest to be calculated as set forth in 56 Ill. Adm. Code, Section 5300.1145;
- e. That back pay liability continue to accrue at the rate of \$558.92 per week (\$29,064 / 52 weeks. With annual 3% raises, Complainant's salary would be \$29, 064 per year) from the date of this Recommended Order and Decision until Respondent offers Complainant reinstatement;
- f. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;
- g. That Respondent be ordered to cease and desist from further unlawful discrimination;
- h. That the Respondent be ordered to pay to Complainant the sum of \$56,966.00 for the services rendered by Attorney Lonny Ben Ogus;
- i. That Respondent be ordered to pay to Complainant the sum of \$816.06 as reimbursement for expenses reasonably incurred in the prosecution of this matter;

HUMAN RIGHTS COMMISSION

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BY:  
WILLIAM H. HALL  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

ENTERED: September 18, 2003

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<sup>4</sup> 22,494 x 9 years + 3% annual raises. The 2003 raise was prorated to August 2003.