

May 8, 1989

West Publishing Company  
Editorial Department  
50 W. Kellogg Blvd.  
P.O. Box 64526  
St. Paul, MN 55164-0526

RE: Rathore v. Commonwealth of Virginia,  
Department of Transportation  
Civil Action No. 88-0403-R  
December 20, 1988

Gentlemen:

In accordance with your letter dated May 5, I enclose Judge Williams' opinion which was filed on December 20, 1988 in the above-referenced case.

The attorneys for the parties are:

Plaintiff:

Gerald T. Zerkin, Esq.  
Karen L. Ely-Pierce, Esq.  
Gerald T. Zerkin & Associates  
Linden Tower Professional Centre  
2nd & Franklin Streets  
Richmond, VA 23219

William Shields, Esq.  
Anderson, Parkerson & Shields  
3437 West Cary Street  
Richmond, VA 23221

Defendants (all):

Mary Sue Terry, Attorney General  
Walter A. McFarlane, Deputy A.G.  
John J. Beall, Jr., Sr. Asst. A.G.  
Office of the Attorney General  
101 N. Eighth Street  
Richmond, VA 23219

Very truly yours,

Maria C. Edwards  
Secretary to Judge Williams



**West Publishing Company**  
50 W. Kellogg Blvd.  
P.O. Box 64526  
St. Paul, MN 55164-0526  
(612)228-2500

May 5, 1989

Hon. Richard L. Williams  
Judge, U. S. District Court  
P. O. Box 2AD  
Richmond, Virginia 23205

Re: Rathore v. Commonwealth of Virginia,  
Department of Transportation, No.  
88-0403-R, Dec. 20, 1988

Dear Judge Williams:

Our attention has been directed to your opinion in the  
above matter.

We would appreciate receiving a copy for publication.  
Please send the copy together with the names and addresses  
of counsel for the respective parties and the date of  
filing.

We would appreciate knowing of any subsequent order  
affecting the opinion.

WEST PUBLISHING COMPANY  
Editorial Department  
612/228-2493

RAF

February 8, 1989

Emma Porter  
Adjudicial Opinions Unit  
The Bureau of National Affairs, Inc.  
1231 Twenty-fifth Street, NW  
Washington, D.C. 20037

Re: Rathore v. Commonwealth of Virginia  
Civil Action No. 88-0403-R

Dear Ms. Porter:

In accordance with your letter dated February 1, 1989 to Judge Williams, I enclose copy of his decision in the above-referenced matter which was filed on December 20, 1988.

The attorneys for the parties in this case are:

Plaintiff: Gerald T. Zerkin, Esq.  
Karen L. Ely-Pierce, Esq.  
Gerald T. Zerkin & Associates  
Linden Tower Professional Centre  
Suite 108  
2nd & Franklin Streets  
Richmond, VA 23219

William Shields, Esq.  
Anderson, Parkerson & Shields  
3437 West Cary Street  
Richmond, VA 23221

Defendants (all): Mary Sue Terry, Attorney General  
Walter A. McFarlane, Deputy A.G.  
John J. Beall, Jr., Sr. Asst. A.G.  
Office of the Attorney General  
101 North Eighth Street  
Richmond, VA 23219

Very truly yours,

Maria C. Edwards  
Secretary to Judge Williams



THE BUREAU OF NATIONAL AFFAIRS, INC.

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February 1, 1989

Honorable Richard L. Williams  
United States District Court  
Eastern District of Virginia  
Post Office Box 2-AD  
Richmond, Virginia 23205

Dear Judge Williams:

Our editorial department would like to obtain a copy of your decision in RANJEET S RATHORE v. DEPARTMENT OF TRANSPORTATION, (please see copy of enclosed clipping). We would also like to receive a list of the attorneys for both parties. We would greatly appreciate your kind assistance in supplying this data to us.

Thank you very much for your courtesy.

Sincerely,

Emma Porter  
Judicial Opinions Unit

ep

Enclosurer

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# Transportation engineer wins back pay, promotion

By Frank Green  
Times-Dispatch staff writer

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A U.S. district judge, finding that the state Department of Transportation probably was motivated by racial discrimination, awarded back pay and a promotion to an engineer who claimed employment discrimination.

The case of Rajjeet S. Rathore, whose nationality is Indian, was tried before Judge Richard L. Williams last week. His ruling was made public yesterday.

Rathore is a planning engineer and has worked with the department for 15 years. He has "applied for advanced positions numerous times and has not been promoted," according to the ruling.

Rathore sued the department and David W. Berg, the assistant division administrator for the department's Rail and Public Transportation Division, alleging that the promotion he

had sought was given to a white female as a result of discrimination based on race and national origin.

The department argued that the other candidate, Kathy W. Anderson, was better qualified.

But Williams said that "even if the court were to conclude that the candidates' objective qualifications were equal and therefore that the defendants were forced to choose between them based on some subjective reason, the court concludes that the subjective reason was more likely discriminatory than legitimate."

Williams said he weighed the experience and qualifications of the two and found that "Rathore was at least as qualified, if not more qualified, than Anderson for the engineer ... position."

"In fact, the defendants may not have even made the same effort to discover the two candidates' qualifications.

"His education was much more ex-

tensive than Anderson's, and his six years of transportation operations experience in India compares favorably with Anderson's" experience.

"This is not the first allegation of race discrimination against the department," Williams noted.

The judge said that "minorities are still not well represented in the Rail and Public Transportation Division; the division employs only one black male engineer in the lowest slot."

"This statistical evidence and the department's past history are relevant in determining whether the defendants acted with impermissible motive."

Williams ordered the department to provide \$5,026.80 in back pay and told it that Rathore is entitled to the pay rights and privileges that come with such a promotion.

The judge told the department, however, that it may wait until an appropriate slot opens before it actually promotes Rathore. He also awarded \$11,832 in attorneys' fees and expenses to Rathore.





Transportation ("VDOT") as a Transportation Planning Engineer B. He has worked for the Department for fifteen years as a transportation planner and engineer. He has applied for advanced positions numerous times and has not been promoted. He has held the Engineer B position since 1973, and is still employed by the Department.

2. Defendant VDOT is an agency of the Commonwealth of Virginia, and employs more than 15 persons.

3. Defendant David W. Berg is employed by the Department as Assistant Division Administrator for the Rail and Public Transportation Division ("the Division"). He is sued in his official capacity.

#### B. THE PROMOTION PROCESS

4. The Public Transportation branch of the Division has fourteen staff members, 11 of which are classified as Engineers A, B, or C. Five of these are graded as Engineer C, and their functions include grant management, financial management, and human services (Trial testimony of David W. Berg).

5. An Engineer C vacancy opened in the Rail branch of the Division, and when it was not filled the vacancy was transferred to the Public Transportation branch (Trial testimony of David Berg).

6. The main job of the Engineer C position, as described in the defendants' Position Description, was to conduct annual evaluations of the state's public transportation systems. Lesser jobs included urban transportation planning, directing seminars



in transportation technology, and administration of those federal and state grants aimed at "technical assistance" for local programs (Defendant's exhibit 2).

7. The Public Transportation branch advertised for the position in January 1987 (Plaintiff's exhibit 3). They sought applicants with three main qualifications: knowledge of transportation operations and planning, knowledge of federal grants, and experience with certain microcomputer software (Trial testimony of David Berg).

8. From the initial pool of applicants, Berg and others selected eight candidates to interview; one found other employment and withdrew her name. Rathore was one of the seven interviewed. The interview committee consisted of Berg, Charles Badger, and Robert Corder (Trial testimony of David Berg).

9. After conducting the interviews, the committee advised the seven candidates that none of them met all of the criteria the committee was seeking, and that the Division would readvertise the position, keeping the seven interviewees under consideration (Plaintiff's exhibit 11).

10. VDOT policy permits a Division to readvertise whenever it determines that the pool is inadequate (Trial testimony of Carol Maguire; Defendant's exhibit 11).

11. Kathy W. Anderson, a white female recently promoted to Engineer B, responded to the readvertisement and was eventually promoted.

12. Rathore filed a timely Charge of Discrimination with the EEOC alleging race and national origin discrimination on August

25, 1987. The Justice Department issued a Right To Sue letter on March 18, 1988 (Plaintiff's exhibits 24 and 25).

### C. RELATIVE QUALIFICATIONS

13. Anderson holds a B.S. degree in sociology, which has no direct relation to transportation issues or the Engineer C's functions, and nine hours towards a Masters in Public Administration. Rathore holds a B.S. in Mining Engineering, and an M.S. in Transportation Engineering and Planning with an emphasis in Public Transportation (Trial testimony of Anderson and Rathore).

14. Before joining the Department, Anderson worked at a senior center and then for one year set up and directed a shuttle bus service in rural North Carolina that ferried senior citizens, the disabled, and other clients of state human service agencies to and from their homes. She applied for grants under UMTA §§ 16(b)(2) and 18 to fund the program. Her only experience in program evaluation, the VDOT position's main function, was when she evaluated the program she had established. She has no hands-on experience with urban transportation operations (Defendant's exhibit 8; trial testimony of Anderson).

15. Before joining the Department, Rathore spent six years supervising 500 employees per shift at a mining operation in India, and supervised a transportation program that shuttled 250 workers to and from their homes (Trial testimony of Rathore).

16. Anderson joined VDOT about four years ago, after her year in North Carolina. She spent slightly over two of those

four years as a financial analyst; 85% of this job was invoice processing. She became sufficiently familiar with federal grant regulations to process the invoices, and kept a chart of accounts. A 1986 VDOT Management Services Division report recommended converting her position from "professional" to "accounting" because the duties are largely, though not entirely, clerical (Trial testimony of Anderson; Plaintiff's exhibit 1, Defendant's exhibit 13).

17. In December 1986 Anderson was laterally transferred to another Engineer A position in grants management. Grant applications are accepted in VDOT from December 1 until February 15, but very few applications are filed before the deadline. Until that time the Engineers merely advise applicants of grant requirements (Trial testimony of Anderson).

18. Anderson had only twelve days of actual grant management experience, because she was promoted to Engineer B on March 1, 1987. Three months later, on June 1, 1987, she was promoted over Rathore to the Engineer C position (Trial testimony of Anderson).

19. Anderson has been extensively trained in the use of spreadsheet computer software (Trial testimony of Anderson).

20. Rathore has been with the Department for fifteen years. He was initially classified as a Technician B, a position below the Engineers, and was promoted to Engineer B in 1973 (Trial testimony of Rathore).

21. In working for the Department Rathore has obtained substantial experience in evaluating local transportation programs and long- and short-range transportation planning. He

provided technical assistance to several major projects, notably in Bristol and Kingsport, and evaluated those programs. He has also managed federal grant programs under UMTA (Defendant's exhibit 3; trial testimony of Rathore).

22. Both Anderson and Rathore have experience in public speaking and relating to public officials. Rathore does have an accent, but no one in the Department has ever had difficulty understanding him, nor has it had any indication that Rathore has had interpersonal difficulties working with his subordinates or other groups around the state (Deposition of David Berg).

23. In considering the applications, VDOT considered Anderson's departmental evaluations, which are very favorable, but did not consider Rathore's which are also uniformly favorable (Plaintiff's exhibits 13-19). Consideration of some applicant's evaluations and not others' is a practice VDOT permits but strongly discourages (Trial testimony of Charles Badger and Carol Maguire).

24. Rathore was at least as qualified, if not more qualified, than Anderson for the Engineer C position advertised on January 1, 1987.

25. Of the approximately twenty engineer positions in the Rail and Public Transportation Division, nineteen are white and one is a black male. The black engineer is an Engineer A; there are no minority Engineers B or C (Trial testimony of David Berg; Plaintiff's exhibit 12).

26. VDOT's employment selection process is subject to a consent decree aimed at eliminating alleged discriminatory

patterns and practices based on race and sex (Plaintiff's exhibits 8, 9).

#### CONCLUSIONS OF LAW

1. The plaintiff is a member of a distinct subgroup protected by Title VII against racial and national origin discrimination. He sues under 42 U.S.C. §2000e-5 and 42 U.S.C. §1983.

2. The Court has jurisdiction over these two claims under 28 U.S.C. §1331, 42 U.S.C. § 2000e-5.

3. The §1983 action against the Commonwealth of Virginia and against David Berg is barred as to both defendants by the Eleventh Amendment, and must be dismissed. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974).

4. In Title VII cases, the burden of proof is allocated according to the scheme set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Initially the plaintiff must prove a prima facie case; the parties here orally stipulated at trial that Rathore had met this initial burden.

5. When the plaintiff proves a prima facie case, a presumption arises that requires the Court to enter judgment for the plaintiff unless the defendant can articulate a nondiscriminatory explanation for the disparate treatment. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. In this case, the defendants rebutted the presumption by claiming that Kathy Anderson was better qualified for the Engineer C job than the plaintiff.

7. Once the defendant articulates a legitimate reason, the plaintiff must prove by a preponderance of the evidence that the reason given is not the real reason, but is merely pretext for discriminatory actions. Burdine, 450 U.S. 248.

8. Where <sup>superior</sup> relative qualifications are advanced as the <sup>of a competing applicant</sup> nondiscriminatory reason for the employment decision, the Plaintiff bears the burden of demonstrating that he was better qualified than the selected employee. Anderson v. Bessemer City, 717 F.2d 149, 153 (4th Cir. 1983), rev'd on other grounds, 470 U.S. 564 (1985).

9. Based on all the testimony, the credibility of the witnesses, and the trial exhibits, the Court concludes that Rathore was at least as qualified as Anderson, and probably more so. His education was much more extensive than Anderson's, and his six years of transportation operations experience in India compares favorably with Anderson's year-long shuttle bus project. Though at trial the defendants emphasized the importance of hands-on experience, Rathore seems to have had at least as much as Anderson. The defendant listed performance evaluations as the position's primary function; the evidence shows that Anderson has done one performance evaluation in her career, reviewing her own work, whereas Rathore has been involved in evaluations of local transportation programs, both rural and urban, throughout his fifteen years with the Department. The

great weight defendants attribute to Anderson's one-year experience in rural North Carolina is unjustified in considering applicants for an urban position and in rejecting the plaintiff's application. By all objective measures the candidates were at least equally qualified.

10. In fact, the defendants may not even have made the same effort to discover the two candidates' qualifications. The interview committee reviewed Anderson's departmental evaluations, but not Rathore's. Carol Maguire, Employee Relations Manager for VDOT, testified at trial that although candidates' evaluations need not be considered once those candidates have been rejected for the job, the Department strongly discourages the review of some evaluations and not others of candidates still being considered. Though Rathore had been notified that the the Division would readvertise, it kept his name under consideration. This decision to review Anderson's past performance and not Rathore's was never explained.

10. Even viewing the evidence most favorably to the defendants, then, the candidates were equally qualified, and the defendants' argument that their decision was legitimate because Anderson was more qualified is suspect.

11. Even if the Court were to conclude that the candidates' objective qualifications were equal, and therefore that the defendants were forced to choose between them based on some subjective reason, the Court concludes that that subjective reason was more likely discriminatory than legitimate.

12. This is not the first allegation of race discrimination against the Department. Despite the consent decree (Plaintiff's exhibits 8 and 9) entered into March 1, 1983, minorities are still not well represented in the Rail and Public Transportation Division; the Division employs only one black male engineer in the lowest ranking engineer slot. This statistical evidence and the Department's past history are relevant in determining whether the defendants acted with an impermissible motive. See, e.g., Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987); Black v. City of Akron, 831 F.2d 131 (6th Cir. 1987); Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979).

13. If the operative result of promotion or hiring policies is discrimination under Title VII, even facially neutral policies will be found illegal within the meaning of the statute, especially if the defendants have a suspect history. See U.S. v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970).

14. Considering the candidates' relative qualifications, the testimony at trial, the credibility of the various witnesses, and the Department's history in this area, the Court concludes that the defendants' decision to promote Kathy Anderson instead of the plaintiff was more likely motivated by discriminatory motives than by their asserted reason that she was more qualified.

15. The Court therefore finds in favor of the plaintiff. He is entitled to recover back pay as calculated by the defendant, in the amount of \$5,026.80.

16. He is also entitled to be promoted to Highway Transportation Planning Engineer C, at that position's rate of



pay and with all the rights and privileges of that position. Though he is entitled to the Engineer C rate of pay starting as of December 14, 1988, the Department may, if it chooses, wait until an Engineer C slot becomes available before it actually promotes Rathore to that position.

17. Prevailing parties are entitled to attorneys' fees in actions under Title VII. 42 U.S.C. §2000e-5(k). Courts generally start with a market rate for each attorney, multiplied by the number of hours reasonably expended, and then consider twelve other factors as possible adjustments to the computed fee. See Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981) (computation of lodestar); Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir.), cert. denied, 439 U.S. 934 (1978)(twelve factors).

18. The Court's determination of the hours reasonably expended "is not a mechanical exercise." Anderson, 658 F.2d at 249. The Court must consider reduction of the requested hours for duplicative efforts, unproductive time, and like considerations. The Court finds that the time recorded in the two plaintiff's attorneys' submissions to the Court reflects a reasonable number of hours required to litigate a case of this type, but reduces each by five hours to account for duplicative efforts. The Court therefore awards fees to Gerald T. Zerkin for 39.9 hours, to William G. Shields for 26.0 hours, and to Mr. Zerkin's associates for 19.2 hours.

19. The plaintiff's attorneys claim the following rates: Gerald Zerkin, \$150 per hour; Mr. Zerkin's associates, \$90 per hour. Mr. Shields did not submit a proposed rate. Both Zerkin

and Shields are experienced litigators, and have been engaged in trial practice in Virginia since 1976 and 1972, respectively. Each has handled a great number of civil rights cases, and the Court finds that the expertise of these attorneys justifies the requested rates. For Mr. Shields, who did not request a rate but second-chaired the trial, the Court believes that \$100 per hour is an appropriate rate. Multiplying these rates by the number of hours expended yields the following fees: Gerald Zerkin, \$5,985.00; William Shields, \$2,600.00; and Mr. Zerkin's associates, \$1,728.00. The "lodestar" is therefore \$10,313.00.

20. The Court concludes that the case does not present circumstances that would justify enhancing the award under the Barber factors. The issue was not particularly novel or difficult, nor did it require extraordinary skill to litigate. The case was not undesirable within the legal community, nor did it preclude plaintiff's attorneys from taking other work any more than the usual case. No strict time limits were imposed by the client or circumstance, and the amount involved, though prospectively somewhat large, was not unusual. The fee was fixed rather than contingent. For these reasons, the Court awards the lodestar of \$10,313.00 without enhancement.

21. The plaintiffs have also requested reimbursement for their expenses. The Court finds these reasonable, and awards the following expenses: Shields, \$270.00; Zerkin and his associates, \$1,249.97. The grand total of fees and expenses is therefore \$11,832.97.

IT IS SO ORDERED.

Let the Clerk send a copy of these Findings of Fact and  
Conclusions of Law to all counsel of record.

\_\_\_\_\_  
DATE

*Richard L. Williams*  
\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE