



**WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**ANNUAL REPORT  
FISCAL YEAR 2004  
(Calendar Year 2003-2004)**

**1321 PLAZA EAST, SUITE 108A  
CHARLESTON, WEST VIRGINIA 25301-1400**

**IVIN B. LEE  
EXECUTIVE DIRECTOR**





**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

1321 Plaza East  
Room 108A  
Charleston, WV 25301-1400

**Bob Wise**  
Governor

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**Ivin B. Lee**  
Executive Director

**December 1, 2004**

**The Honorable Bob Wise**  
Governor, State of West Virginia  
State Capitol  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

**Members of**  
**The West Virginia Legislature**

**Dear Governor Wise and Members:**

It is with pleasure that I present to you the 2003-2004 Annual Report which documents a year of the many activities of the West Virginia Human Rights Commission. This report will provide you with information on the past year's activities and outline future programs which are designed to ensure the Commission not only meets, but exceeds its mission.

The Human Rights Commission vigorously continues to safeguard the human rights laws of the citizens of the great State of West Virginia. The Commission's mandate of administering and enforcing those laws assures equal protection in the areas of employment, housing and public accommodations to all West Virginians.

The support we have received this past year from Governor Wise and the West Virginia Legislature has enabled this Commission to work more diligently in our efforts to eradicate discrimination and to protect civil and human rights in West Virginia..

Respectfully submitted,

  
IVIN B. LEE  
Executive Director



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## THE COMMISSIONERS



Lew Tyree, Chair  
Kanawha County



Charlene Marshall, Vice Chair  
Monongalia County



Joan Browning  
Greenbrier County



Marion J. Capehart  
McDowell County



Kenneth Gilbert  
Wood County



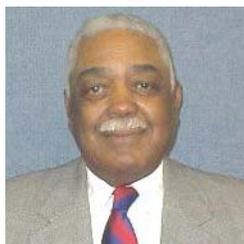
Betsy Haight  
Marion County



Wendy Radcliff  
Kanawha County



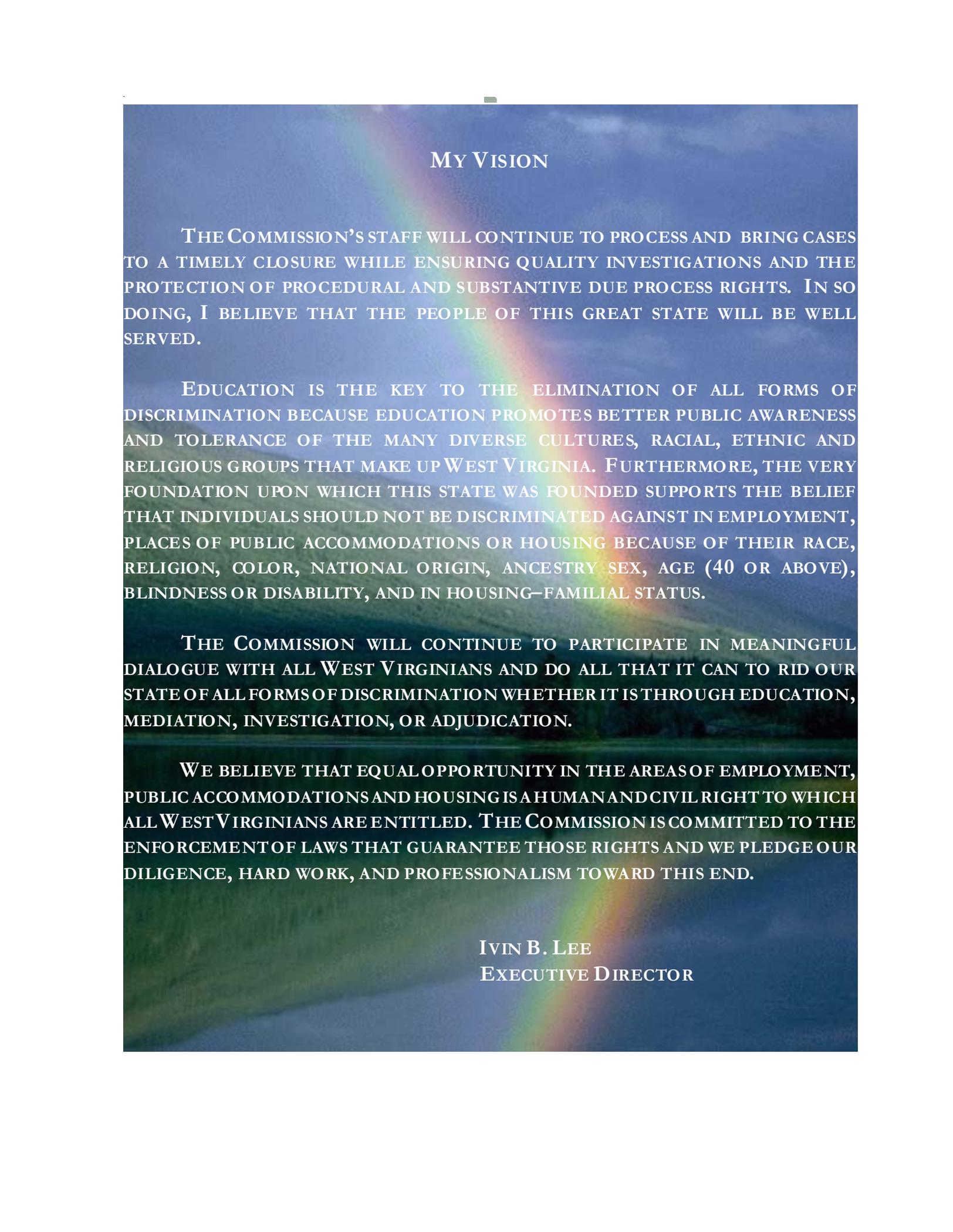
H.R. Whittington  
Kanawha County



William W. Williams  
Logan County



**Ivin B. Lee**  
**Executive Director**  
**West Virginia Human Rights Commission**



## MY VISION

THE COMMISSION'S STAFF WILL CONTINUE TO PROCESS AND BRING CASES TO A TIMELY CLOSURE WHILE ENSURING QUALITY INVESTIGATIONS AND THE PROTECTION OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS. IN SO DOING, I BELIEVE THAT THE PEOPLE OF THIS GREAT STATE WILL BE WELL SERVED.

EDUCATION IS THE KEY TO THE ELIMINATION OF ALL FORMS OF DISCRIMINATION BECAUSE EDUCATION PROMOTES BETTER PUBLIC AWARENESS AND TOLERANCE OF THE MANY DIVERSE CULTURES, RACIAL, ETHNIC AND RELIGIOUS GROUPS THAT MAKE UP WEST VIRGINIA. FURTHERMORE, THE VERY FOUNDATION UPON WHICH THIS STATE WAS FOUNDED SUPPORTS THE BELIEF THAT INDIVIDUALS SHOULD NOT BE DISCRIMINATED AGAINST IN EMPLOYMENT, PLACES OF PUBLIC ACCOMMODATIONS OR HOUSING BECAUSE OF THEIR RACE, RELIGION, COLOR, NATIONAL ORIGIN, ANCESTRY SEX, AGE (40 OR ABOVE), BLINDNESS OR DISABILITY, AND IN HOUSING—FAMILIAL STATUS.

THE COMMISSION WILL CONTINUE TO PARTICIPATE IN MEANINGFUL DIALOGUE WITH ALL WEST VIRGINIANS AND DO ALL THAT IT CAN TO RID OUR STATE OF ALL FORMS OF DISCRIMINATION WHETHER IT IS THROUGH EDUCATION, MEDIATION, INVESTIGATION, OR ADJUDICATION.

WE BELIEVE THAT EQUAL OPPORTUNITY IN THE AREAS OF EMPLOYMENT, PUBLIC ACCOMMODATIONS AND HOUSING IS A HUMAN AND CIVIL RIGHT TO WHICH ALL WEST VIRGINIANS ARE ENTITLED. THE COMMISSION IS COMMITTED TO THE ENFORCEMENT OF LAWS THAT GUARANTEE THOSE RIGHTS AND WE PLEDGE OUR DILIGENCE, HARD WORK, AND PROFESSIONALISM TOWARD THIS END.

IVIN B. LEE  
EXECUTIVE DIRECTOR

# THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

## MISSION STATEMENT

The West Virginia Human Rights Commission will encourage and endeavor to bring about respect, tolerance and mutual understanding among all citizens of West Virginia, regardless of their race, religious persuasion, color, national origin, ancestry, sex, age (40 or above), blindness or disability. The Commission will administer and ensure adherence to, through education, investigation, mediation and adjudication, the Human Rights Act, which prohibits discrimination in employment, housing and places of public accommodation.

## DECLARATION OF POLICY

It is the public policy of the State of West Virginia to provide all citizens equal opportunity for employment, equal access to places of public accommodations and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age (40 and above), blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

Unlawful discrimination damages both the individual and society in a myriad of ways, not the least of which is shame and humiliation experienced by the victim's feelings that diminish the person's ability to function in every area of life. Society is damaged by the unwarranted and foolish refusal to accept an individual's talents and efforts merely because of race, sex, religion, age, color, ethnicity or disability. With regard to housing, discrimination strikes at the dignity of the individual. It says to the victim that "No matter how much money you have," "No matter what your social position, you cannot live here." The victim is denied basic necessities of life (shelter) and fundamental freedom (the right to live where one chooses).

Specifically, the West Virginia Human Rights Act prohibits discrimination by any employer employing 12 or more persons within the state for twenty (20) or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year: Provided, That such terms shall not be taken, understood, or construed to include a private club, based on race, color, religion, national origin, ancestry, sex, age (40 and above), blindness or disability in the selection, discharge, discipline or other terms and conditions of employment. The Act also prohibits any advertisement of employment that indicates any preference, limitation, specification or discrimination based on race, religion, color, national origin, ancestry, sex, age, blindness or disability. Lastly, it is unlawful under the Act to retaliate or discriminate in any manner against a person because the person has opposed a practice declared unlawful by this Act or because the person has made or filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing concerning an unlawful practice under the Act.

The Fair Housing Act protects each person's right to personal dignity and freedom from humiliation, as well as the individual's freedom to take up residence wherever the individual chooses. This Act prohibits discrimination in housing based on race, religion, color, sex, national origin, ancestry, disability and familial status (the presence of children under the age of 18 years of age in the household). Wide ranges of discriminatory practices are prohibited, affecting a variety of persons and businesses. Realtors, brokers, banks, mortgage lenders, insurance companies, developers, real estate buyers and sellers, landlords and tenants are all affected by the Fair Housing Act. It is important that all those covered by the Act know their rights and duties under the Act.

## **HIGHLIGHTS OF THE WV HUMAN RIGHTS ACT**

The West Virginia Human Rights Act (W.Va. Code § 5-11) was enacted in 1961 and is administered and enforced by the West Virginia Human Rights Commission.

### **Employment Discrimination and Harassment W.Va. Code § 5-11-9(1)**

*It shall be an unlawful discriminatory practice . . . For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment . . . .*

### **Public Accommodations Discrimination W.Va. Code § 5-11-9(6)(A)**

*It shall be an unlawful discriminatory practice . . . For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to: (A) Refuse, withhold from or deny to any individual because of his race, religion, color, national origin, ancestry, sex, age, blindness or handicap, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of such place of public accommodations; . . . .*

### **Reprisal Related to Employment or Public Accommodation W.Va. Code § 5-11-9(7)(A)(C)**

*It shall be an unlawful discriminatory practice for any person to . . . (A) Engage in any form of threats or reprisal, . . . or otherwise discriminate against any person because he has . . . filed a complaint, testified or assisted in any proceeding under this article.*

### **Housing Related Reprisal and Intimidation W.Va. Code § 5-11A-16**

*It shall be unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections four, five, six or seven . . . of this article.*

The West Virginia Code is available in public libraries and on the Legislature's web page, <http://legis.state.wv.us/>

## **Administrative Law Judges**



**Phyllis Carter**



**Robert Wilson**



**Elizabeth Blair**

## OUR STAFF



Rick Ashwell  
Investigator



William Bailey  
Mail Runner



Leola Bateman  
Secretary



George Bearfield  
Investigator



Yodora Booth  
Investigator



Linda Bowers  
Investigator



Robert Brammer  
Investigator



Sally Brown  
Investigator



Leona Chupick  
Office Assistant



Paul W. Cook  
Information Systems



Lisa Gist  
Office Assistant



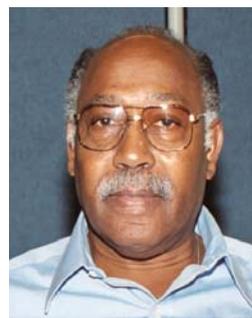
Terry Graley  
Receptionist



Paul Hamilton  
Investigator



Jackie Heath  
Investigator



James L. Johnson  
Investigator



Joyce Knotts  
Secretary



William Mahan  
Supervisor



Wilda McGill  
Office Assistant



Don Raynes  
Supervisor



Deborah Robinson  
Admin. Services Asst.



Hope E. Ross  
Accounting Technician



Carolyn Smith  
Investigator



Tausha Stigall  
Investigator



Monia Turley  
Secretary

# West Virginia Human Rights Commission



## Community Outreach





# *FROM WHENCE WE CAME*

**February 26, 2004**



On February 26, 2004, the West Virginia Human Rights Commission honored the leaders of the civil rights movement within West Virginia. An awards banquet was held at the Charleston Job Corps Center with Governor Bob Wise as one of the guest speakers. Each of the honorees were presented with a special medallion that commemorated their work and achievements in the early days of the West Virginia civil rights movement. This has become an annual event. The 2004 honorees are pictured on the following pages.

# Our 2004 Honorees



Dr. Elayne Croxier Abnathy



Dr. Mildred Mitchell  
Bateman



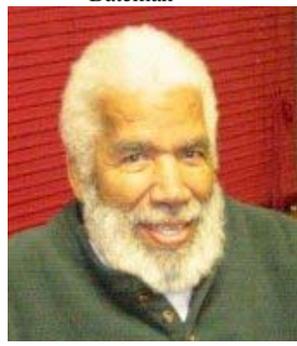
Hollie James Brown



Madrith Chambers



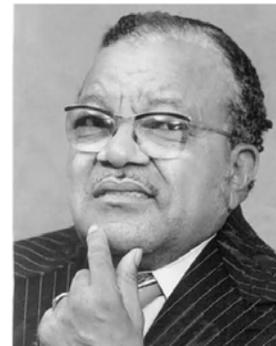
Rev. David C. Chappell  
Posthumously



Sgt. Edward Clark, Jr. (Ret.)



Rabbi Samuel Cooper



Howard Samuel Crump



The Honorable Gail Ferguson



Roger Forman, Esq.



Robert Jackson Guerrant



Betty Agsten Hamilton



Jean F. Loewenstien Lazarus  
Posthumously



Allen Edward Lee



Lucile Meadows  
Posthumously



Rev. Moses Newsome  
Posthumously



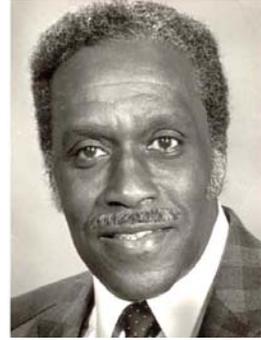
Dr. Sophia Peterson



Dr. Virgil Peterson  
Posthumously



Lucille Pianfetti



Charles Emmett Price, Esq.  
Posthumously



Josephine Morris Rayford  
Posthumously



George Rutherford



Steve Rutledge



Rev. Charles H. Smith



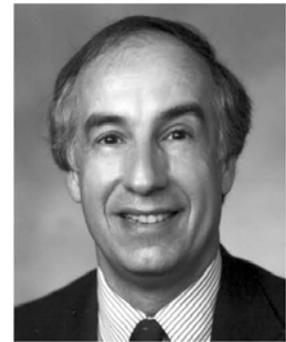
Mary Snow



The Honorable Nancy Starks



The Honorable Booker T.  
Stephens



Reverend Julian Sulgit, Jr.



Leon Howard Sullivan  
Posthumously

## Law Day At The Capitol May 2004



Visitors obtain informative literature at the WV Human Rights Commission's Kiosk.

**Investigators James L. Johnson, Carolyn Smith, Jackie Heath and Sally Brown, maintained the West Virginia Human Rights Commission Information Table on Law Day, May 3rd, at the Capitol Complex. Law Day at the Capitol Complex is an annual event where state and local agencies are given the opportunity to distribute information about available services to the general public. The West Virginia Human Rights Commission is one of many state and local agencies participating in this annual event.**

### THE UPWARD BOUND PROGRAM

**Ivin Lee, WVHRC Executive Director, Don Raynes, WVHRC Director of Operations, and other members of the WVHRC Investigative Staff, have participated in the Upward Bound Program operated by several colleges and universities throughout West Virginia. The Upward Bound Program is a Federally funded program designed to prepare high school students for college and/or postsecondary education. The Upward Bound Program is a year-round program that specifically targets first generation (meaning that neither parent has a college degree) and/or low-income students. This program conducts tutoring sessions in schools, Saturday Challenge Sessions and a six week summer residential program at colleges and universities throughout the state. The goal of this program is to strengthen the skills and competencies needed to succeed in postsecondary education.**

## **THE WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES**



**Investigators James Johnson, Yodora Booth and Rick Ashwell were presented an award plaque on behalf of the WVHRC by WVARF.**

**The West Virginia Association of Rehabilitation Facilities (WVARF) presented the West Virginia Human Rights Commission with an Outstanding Community Service Award. The caption of the award reads: "For dedication and support of West Virginians overcoming barriers to employment." The West Virginia Human Rights Commission has continued to be active in the programs of the West Virginia Rehabilitation Center by providing information and guidance in the area of employment discrimination.**

## **THE CHARLESTON JOB CORPS CENTER**

**The West Virginia Human Rights Commission has continued its close association with the Charleston Job Corps Center. As in past years, the Commission's Staff has continued its participation in various programs with the students at the Job Corps Center. Over the past year (2003-2004) the Commission has given student interns the opportunity to work at the Commission. The internships last a period of several weeks and allows students to gain valuable experience in a "real world" office working environment.**

## **GOODWILL INDUSTRIES OF THE KANAWHA VALLEY**

**Executive Director Ivin Lee, Director of Operations, Don Raynes and members of the Investigative Staff have presented seminars on the aspects of non-discriminatory practices to the students of Goodwill Industries. Goodwill Industries maintains a work training program with the object of training persons of special needs in various occupations. The ultimate goal of Goodwill Industries is to provide its students with employment skills which will lead to independent living. The West Virginia Human Rights Commission has assisted Goodwill Industries in providing information to the students in the area of discriminatory and non-discriminatory practices in employment.**



**Don Raynes, Director of Operations, addressing the students of Goodwill Industries on the rights and responsibilities of both the employee and the employer.**

## **THE NATIONAL FEDERATION OF THE BLIND**

**Investigator Tausha Stigall has represented the West Virginia Human Rights Commission as the Commission's liaison with the West Virginia Chapter of the National Federation of the Blind. Ms. Stigall attends the meetings of the Federation and offers the Commission's assistance in the various programs of the National Federation of the Blind. The Commission has translated various documents and literature of the WVHRC into braille.**

## CAREER DAY AT POCA HIGH SCHOOL



**Robin O'Neal conducting an "employment interview" with a Poca High School Student.**

**In the Fall of 2003, the West Virginia Human Rights Commission participated in a Career Day Program held at Poca High School. The program allowed senior high school students gain experience with interview techniques through mock interviews. Staff members from the Commission participated as mock employers interviewing the students as prospective employees. For some students this was the first experience they had encountered with employment interviews. The Career Day Event is one of many community events throughout West Virginia that the Commission participated in FY 2003-2004.**



**Investigator George Bearfield implementing his own life experiences in assisting a Poca High School Student in gaining employment interviewing skills.**

## **West Virginia Industry Liaison Group “WVLIG”**



**Debra Tygrett, Human Resources for Appalachian Power,  
Lew Tyree, HRC Commissioner, Dana Waldo, President  
and COO of Appalachian Power, and Donna Campbell, also  
with Appalachian Power**

**On May 26, several professionals within the Kanawha Valley met with members of the West Virginia Human Rights Commission and the Charleston Chamber of Commerce for the promotion of a “West Virginia Industry Liaison Group” (“WVILG”). The WVILG would be modeled after the national Industry Liaison Group that consists of large national companies that regularly meet and interact with each other, with the U.S. Department of Labor OFCCP and also the Equal Employment Opportunity Commission.**



**A WVLIIG would bring together industry and compliance agency representatives to discuss mutual goals. It would also provide opportunities for employers to get together two or three times a year to:**

- § Network among themselves**
- § Compare compliance experiences**
- § Share ideas on best practices**
- § Deliberate on regulatory changes, new laws, case law developments, and developing trends**
- § Gain considerable insight into the enforcement community and the compliance community**
- § Enhance the accomplishment of mutual compliance goals.**

**With the many challenges that confront businesses, their leadership and work force within the State of West Virginia, the concept of “Bringing Together Industry and Compliance Agencies” is not only needed but a concept whose time has come.**



# **The West Virginia Hate Crimes Task Force**

**The West Virginia Hate Crimes Task Forces is a working group made up of representatives from federal, state, and local law enforcement departments, human rights agencies and other civil rights organizations. The task force is organized under the auspices of the West Virginia Human Rights Commission.**

## **Resolution Creating the Hate Crimes Task Force**

### **I. PREAMBLE**

**WHEREAS, the West Virginia Legislature, by the enactment of Chapter 61, Article 6, Section 21, has recognized that “all persons within the boundaries of the State of West Virginia have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation or sex;” and**

**WHEREAS, The West Virginia Legislature by the enactment of the West Virginia Human Rights act, Chapter 5, Article 11, Section 3 has recognized that the denial of equal rights to persons “by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society, “ and**

**WHEREAS, The Congress of the United States, in response to growing concern about hate crimes, has enacted Public Law 101-275, 28 U.S.C. § 534, which mandates the collection of data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity;” and**

**WHEREAS, The West Virginia Human Rights Commission, as one of its powers and duties, is to work cooperatively with other agencies of government, community, and civic organizations and representatives of protected groups “in the promotion and attainment of more harmonious understanding and the equal protection of all laws” of all groups and people;**

**BE IT RESOLVED THAT the West Virginia Human Rights Commission hereby creates the West Virginia Hate Crimes Task Force.**

## **II. AUTHORIZATON**

**The Hate Crimes Task Force shall be appointed by the Executive Director of the West Virginia Human Rights Commission. The Task Force shall be comprised of representatives of the West Virginia Human Rights Commission, West Virginia Department of Public Safety, West Virginia Attorney General's Office/Civil Rights Division, and such other persons and organizations as shall be in a position to assist in carrying out its objectives. The Task Force shall include persons who are members of the groups designated by the state or federal hate crimes legislation, and representatives of organizations who advance the rights of such persons.**

**The Task Force shall be authorized to meet, work with other groups, individuals and entities, develop strategies, apply for grants on behalf of the Human Rights Commission and other entities, develop and implement programs, produce educational materials, issue reports, and do such other things as shall serve its purposes. The Hate Crimes Task Force shall address itself to hate crimes, defined broadly, including acts of violence or intimidation committed because of race, color, religion, ancestry, national origin, political affiliation, sex, age, blindness, disability, familial status, sexual orientation or ethnicity. The Task Force shall keep the West Virginia Human Rights Commission advised of its activities.**

## **III. Purposes**

**The purpose of the Task Force shall be:**

- a. To assist the West Virginia Department of Public Safety, Uniform Crimes Reporting Division, and other law enforcement agencies, in the implementation of a Hate Crimes Reporting Act;**
- b. To promote and assist in the training of police officers toward improved recognition of, sensitivity to and response to hate crimes;**
- c. To promote public awareness of the problems of hate crimes, to increase public understanding of the devastating impact of hate crimes, both upon its immediate victims and on all others in the community; and to improve public knowledge of the laws, policies and programs designed to combat hate crimes;**
- d. To promote thought analysis and reporting of the data gathered by the West Virginia Uniform Crime Statistics Reporting Program;**
- e. To make recommendations, if appropriate, to the West Virginia Human Rights Commission, the West Virginia Legislature, the West Virginia Department of Public Safety or other public entities.**



# **West Virginia Human Rights Commission**



## **Investigative and Legal Statistical Information**



# **An Overview Of the Investigative Process**

## **I. The Intake Process**

**This is the first contact that the prospective complainants have with the Commission. The contact is made by telephone, mail or by visiting the Commission's Office. If the complaint appears to meet the minimal jurisdictional requirements, then a background information form is given or sent to the prospective complainant.**

**Upon receiving the background information form, it is examined to determine whether the complaint meets the jurisdictional requirements of the WV Human Rights Act. The complaint must fall into at least one of the following areas: employment, housing and/or public accommodations. If the complaint does not fall into one or more of these areas, a letter of no jurisdiction is sent to explain why the complaint cannot be processed.**

**If the complaint does meet the minimal jurisdictional requirement as mentioned above, the next step is to determine if the complaint has met the following criteria: 1) an act of harm to the complainant has occurred within the last 365 days; 2) the complaint is jurisdictional in regards to the complainant being covered by a protected class such as race, sex, age(40 and above), disability, religion, ancestry, national origin, reprisal, and/or blindness. If the complaint does not meet any of the above jurisdictional requirement then a letter of no jurisdiction is sent to the complainant.**

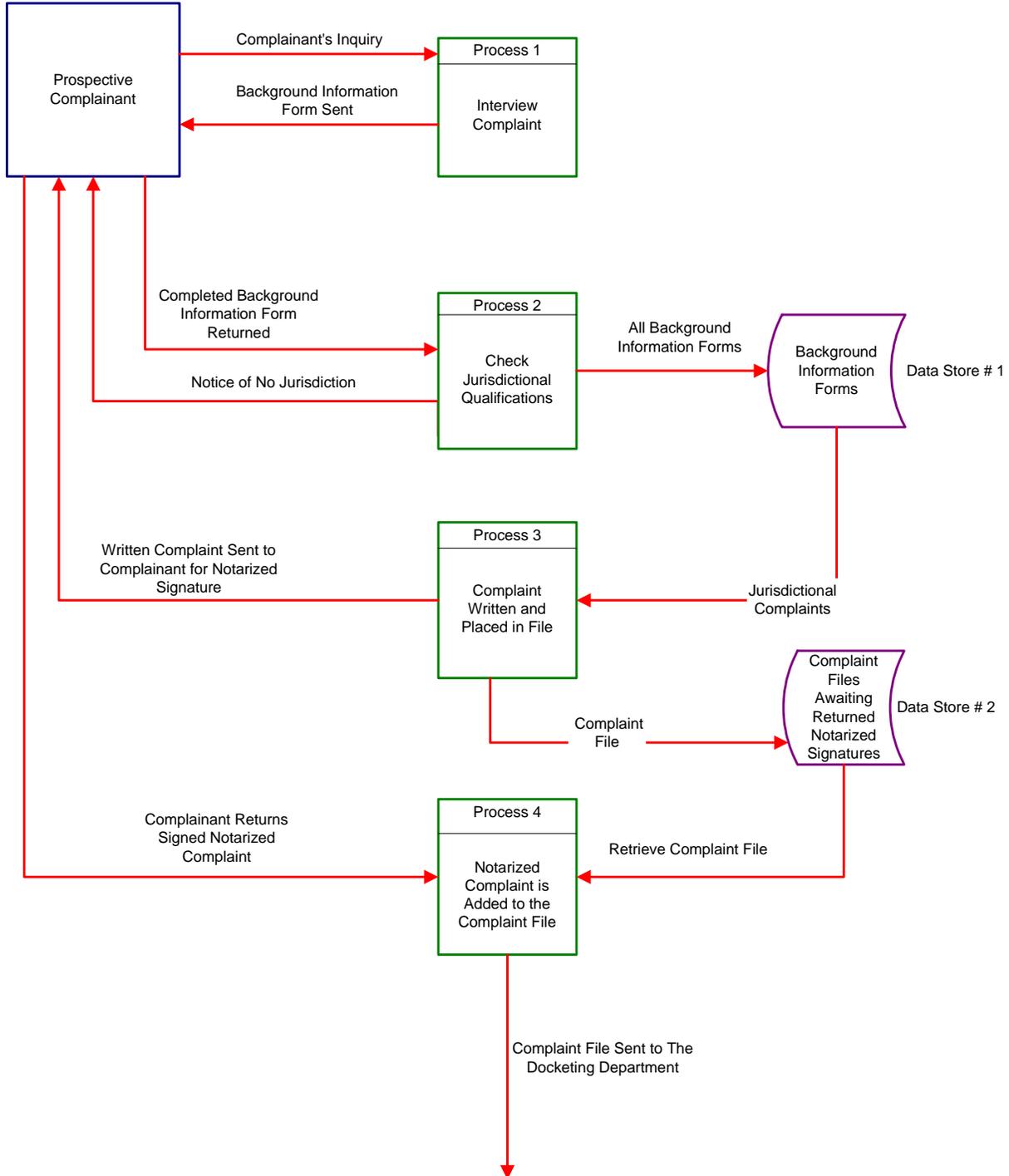
**If the complaint is deemed to be jurisdictional, a formal complaint is then written. This complaint must have the following components: 1) a date of incident that relates to an act of harm to the complainant; 2) a statement describing the act of harm that is being charged against the respondent by the complainant; 3) the name and address of the respondent; 4) the name and address of the complainant; and 5) the complainant must sign the complaint in the presence of a notary public.**

**When a formal notarized complaint is received by the intake department, it is then sent to the docketing department to be formally docketed.**

**The intake process is illustrated in the Date Flow Diagram #1 on the following page.**

# The Intake Process of the West Virginia Human Rights Commission

## Data Flow Diagram 1



## **II. The Docketing Process**

When the docket clerk receives a notarized complaint from the intake department, the complaint receives a docket number which is entered into docket files. The complaint is deemed to be docketed as of the time dated stamp on the complaint indicating the date it was received.

If the complaint is an employment related complaint, it is also dually docketed with the United States Equal Employment Opportunity Commission (EEOC). If the complaint is housing related, it is then dually docketed with the United States Department of Housing and Urban Development (HUD). The West Virginia Human Rights Commission has a continual work sharing agreement with both the EEOC and HUD. In nearly all of the complaint investigations, the West Virginia Human Rights Commission independently conducts the investigation of the complaint. On very rare occasions the complaint is investigated by the EEOC or HUD.

After the complaint is fully docketed, it is then officially served on the party charged with an alleged violation, the respondent. The respondent is served with a service letter, requesting a position statement (the answer to the charges on the complaint), the docketed complaint, as well as other documentation. The complainant also receives the service letter and the docketed complaint, and other documentation appropriate to the type of complaint.

The docketing procedure is illustrated in the Data Flow Diagram # 2 on the following page.

When the docketing is completed the complaint is then sent to the investigative unit for investigation.

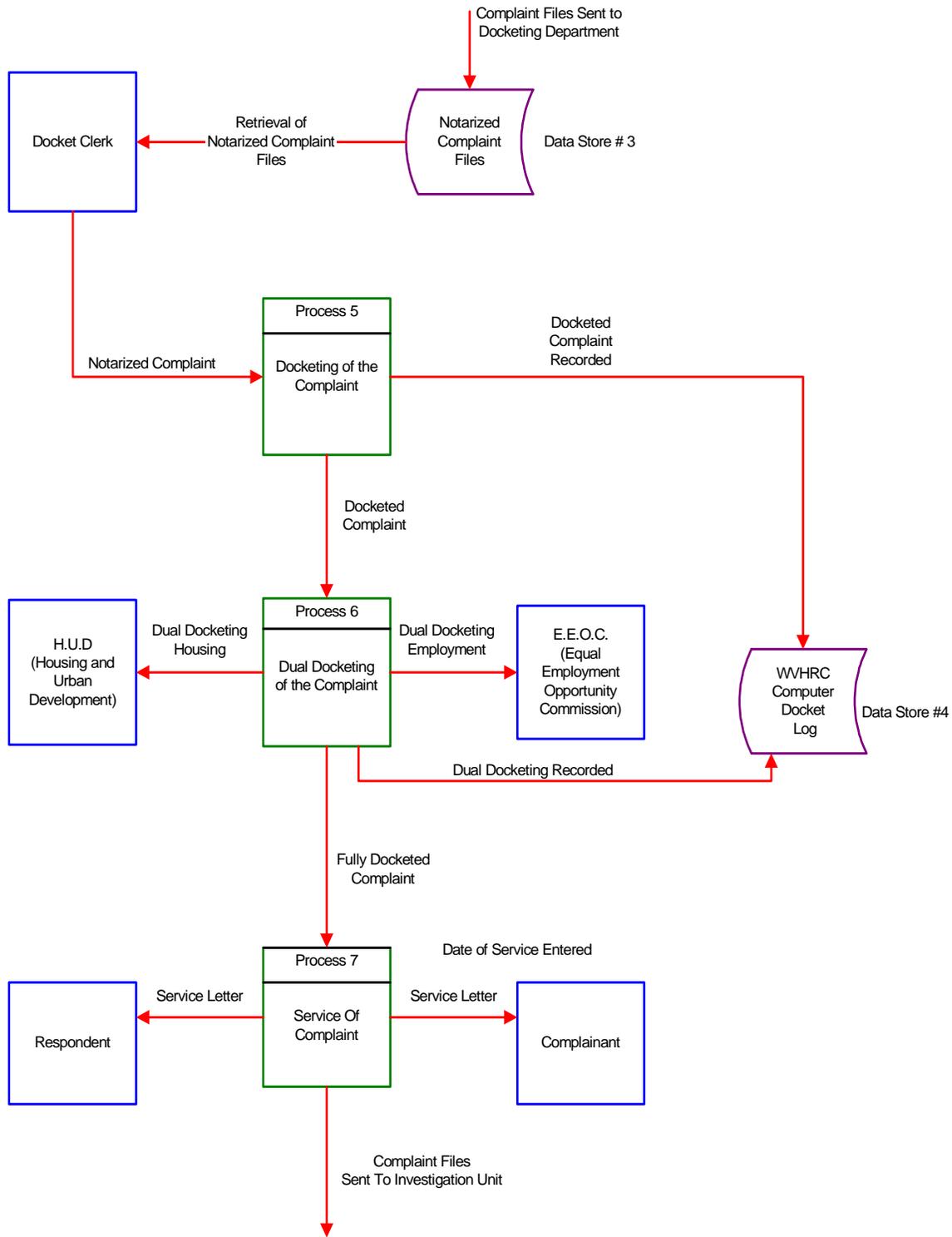
## **III. The Investigative Process**

By the time the complaint reaches the investigative unit the complaint is served and the respondent is required to provide an answer to the alleged charge of discrimination brought by the complainant. The respondent's position statement is usually received within a couple of weeks after the complaint is received by the respondent.

The respondent is required to send a copy of the position statement to the complainant. If the complainant does not receive the position statement the Commission will provide a copy to the complainant. The complainant is asked to provide a rebuttal to the respondent's position statement.

# The Docketing Process of The West Virginia Human Rights Commission

## Data Flow Diagram 2



After the position statement is received and the complainant is interviewed, an entrance triage meeting is held with the investigator and supervisory personnel. The purpose of the entrance triage is to discuss the respondent's position and if received, the complainant's rebuttal to the respondent's position. At the conclusion of this meeting the investigator will have a list of questions and information that will be sent to the respondent in the form of an interrogatory. If necessary the complainant will also be asked to provide additional information.

The complaint is investigated not by one investigator, but by the entire investigative team as a whole. This allows input from several investigators during the course of the investigation which results in a more prompt and efficient investigation.

During the investigation all information received from the respondent and the complainant is analyzed. This information may contain information about the respondent's work force, any documentation that may support the respondent's personnel decisions and other relevant information.

Often, the complainant must play an active role in the investigation. The complainant must provide the investigative team direction in the investigation. This could be in the form of supplying the investigative team with witnesses or other documentation that will refute the respondent's position and strengthen their allegations.

At any stage of the investigation, the case may be recommended for conciliation. This process is outline under the section "The Pre-determination Conciliation Program."

The role of the investigative team is not to "prove the case" for either the respondent or the complainant. During the investigation the Commission acts as an unbiased third party. The role of the investigator is simply to identify, obtain and evaluate evidence which will allow the investigative team to arrive at either a probable cause or a no probable cause finding.

A second triage, the exit triage, is held toward the end of the investigation. An investigator discusses the findings of the investigation with the triage team. Often the investigator will have already reached a recommendation of either probable cause or no probable cause. There are two different types of exit triage, one for probable cause and another for no probable cause.

A probable cause exit triage is held by the Executive Director of the Human Rights Commission. Participants also include a representative from the Attorney General's Office Civil Rights Division, and other members of the designated triage team. At this point the investigator should have the case recommendation written and will discuss the reasons for the recommended finding of probable cause. If the members of the exit triage agree with the investigator, then the case is submitted for an official probable cause finding to be issued by the Commission. If the triage team does not agree with the investigator's recommended finding, then the team instructs the investigator to obtain additional information needed to complete the investigation.

**The no probable cause triage is held by the members of the triage team. As in the probable cause triage, the investigator presents the reasons for the no probable cause recommendation to the triage team. Again, if the team determines that additional information is needed then the investigator is instructed to obtain the information. If the team agrees with the finding then the case is submitted to supervision for an official no probable cause finding to be issued by the Commission.**

**Upon the receipt of a no probable cause finding the complainant may request an appeal in writing to the Executive Director. It is the decision of the Executive Director as to whether the complainant has given sufficient reasons for the appeal.**

**The Data Flow Diagram #3 on the next page outlines the basic investigative process.**

### **The Administrative Hearing**

**Complaints that have been issued a probable cause finding can either be settled through the Commission's Mediation Process (as explained under the Early Dispute Resolution section of this report), or the case can be argued through an administrative hearing.**

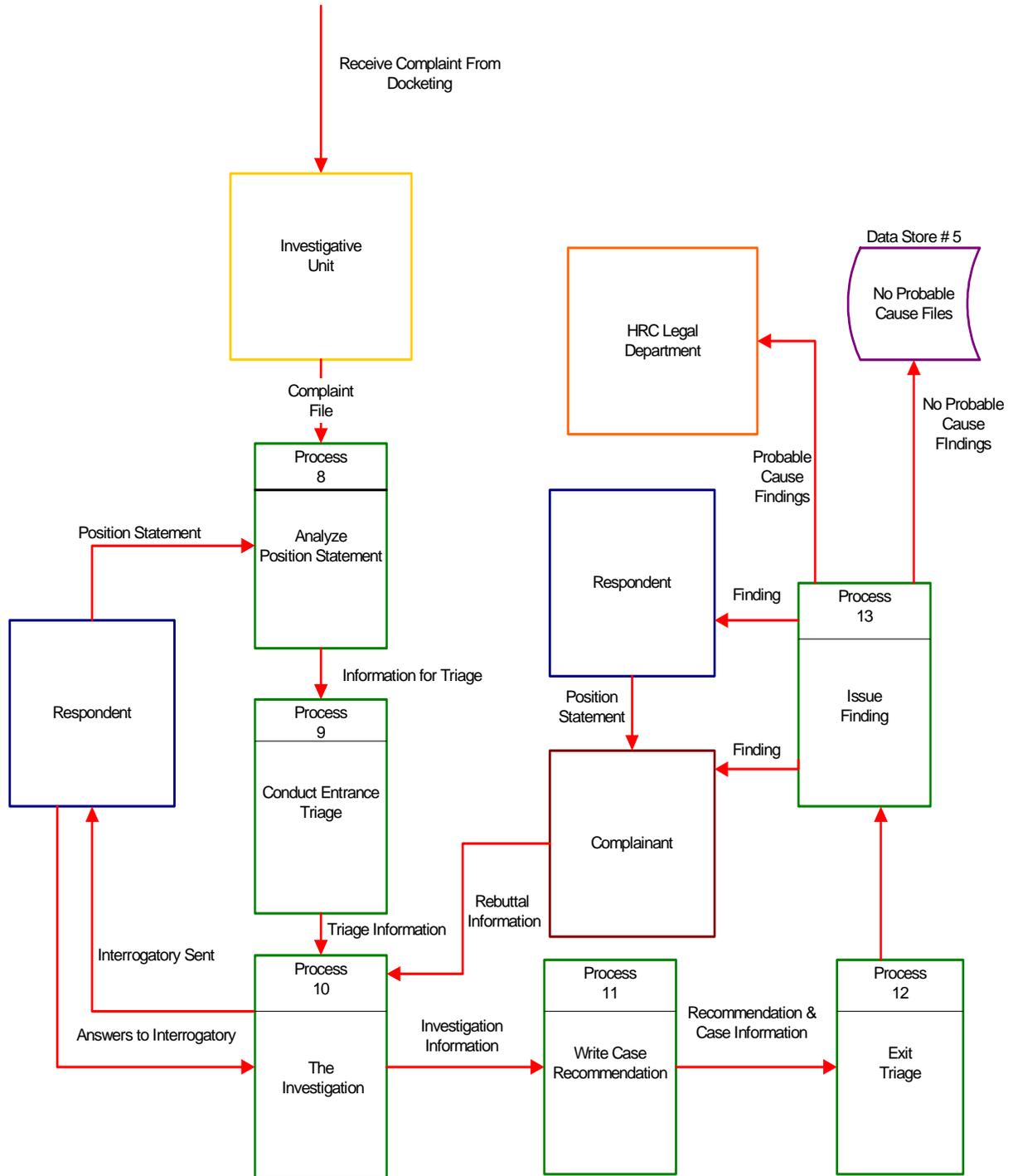
**The complainant may retain their own attorney to represent them at the administrative hearing. If the complainant chooses not to retain their own attorney, the Civil Rights Division of the Attorney General's Office will represent the Commission at the hearing with the participation of the complainant. The administrative hearing is similar to a trial, except the hearing is less formal.**

**The administrative law judge hears the arguments of both the Complainant and the Respondent. Witnesses can be called and evidence can be presented. The administrative law judge can either uphold the finding of probable cause or can reverse the finding to a no probable cause finding.**

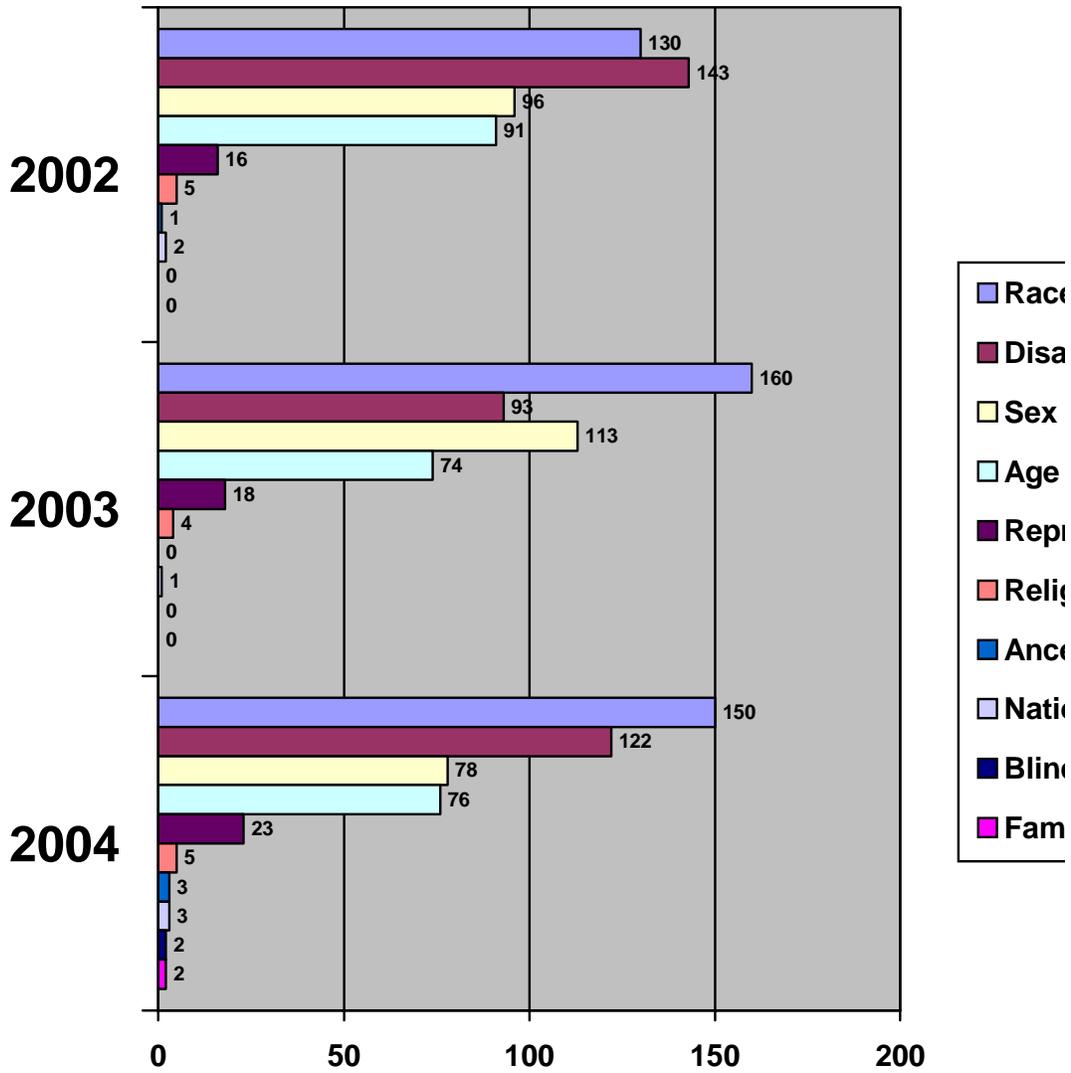
**The judge's decision can be appealed to the West Virginia Supreme Court of Appeals or to the Kanawha County Circuit Court. The Kanawha County Circuit Court can only be utilized if the Commission has awarded damages in excess of \$5000.00 or back pay in excess of \$30,000.00, or by agreement of the involved parties.**

**AN OVERVIEW OF THE INVESTIGATIVE PROCESS  
OF THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

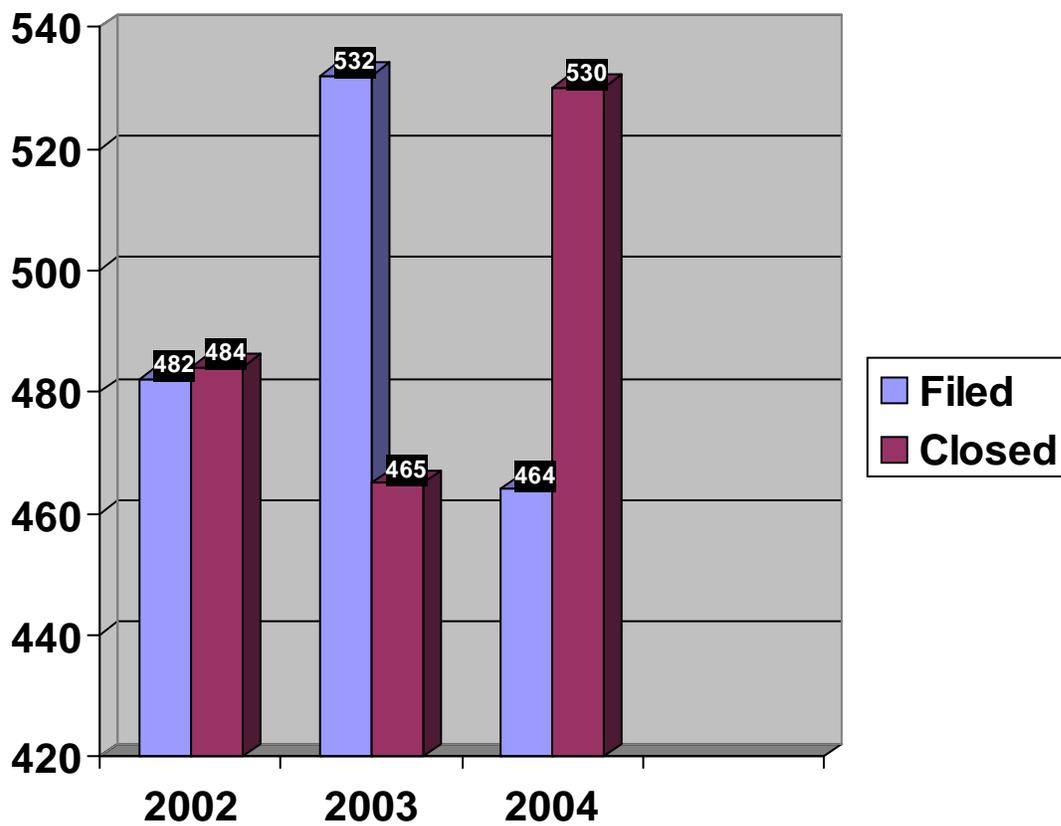
**Data Flow Diagram # 3**



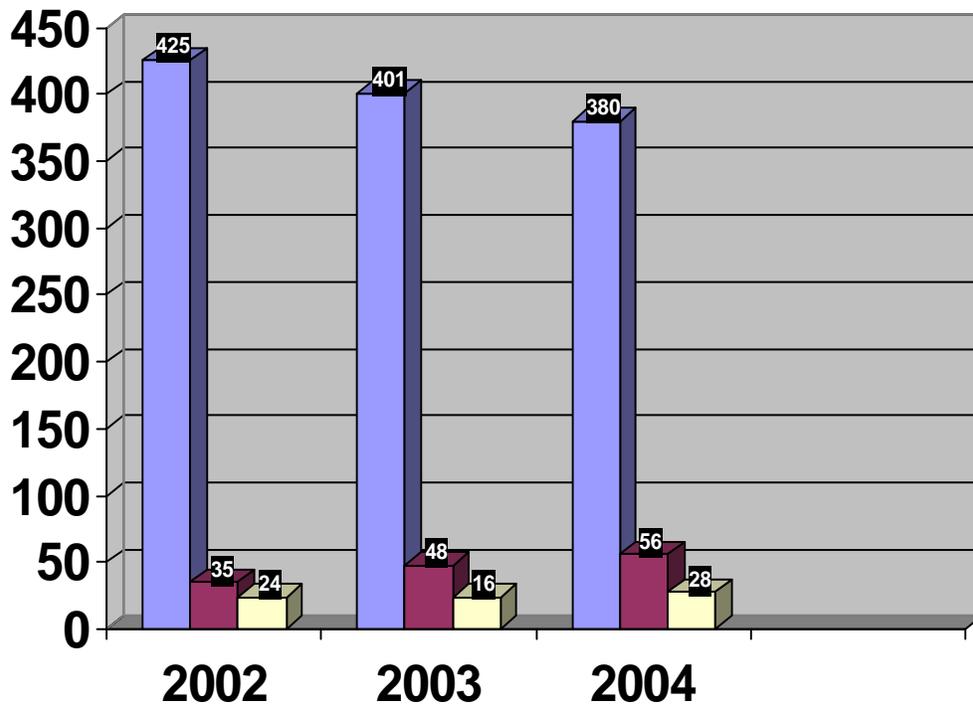
## Three Year History of Complaints filed by Protected Classes



## COMPLAINTS FILED AND CLOSED OVER A THREE YEAR PERIOD



## NEW COMPLAINTS FILED OVER A THREE YEAR PERIOD



**COMPLAINTS FILED PER COUNTY FOR THE PAST THREE FISCAL YEARS**

COUNTY	FY 2002	FY 2003	FY 2004	COUNTY	FY 2002	FY 2003	FY 2004
BARBOUR	0	0	4	MINERAL	4	1	2
BERKELEY	9	9	15	MINGO	7	6	4
BOONE	4	2	5	MONONGALIA	25	17	16
BRAXTON	2	0	3	MONROE	1	0	0
BROOKE	2	1	2	MORGAN	2	0	2
CABELL	37	46	28	NICHOLAS	3	4	4
CALHOUN	1	0	0	OHIO	6	6	4
CLAY	1	0	1	PENDLETON	0	0	0
DODDRIDGE	0	0	0	PLEASANTS	0	1	0
FAYETTE	8	16	14	POCAHONTAS	1	1	1
GILMER	1	0	0	PRESTON	2	2	3
GRANT	2	2	0	PUTNAM	10	8	17
GREENBRIER	4	8	4	RALEIGH	28	16	28
HAMPSHIRE	1	0	2	RANDOLPH	8	16	3
HANCOCK	7	4	4	RITCHIE	2	0	2
HARDY	8	5	5	ROANE	3	3	4
HARRISON	9	15	12	SUMMERS	0	0	1
JACKSON	7	7	6	TAYLOR	1	1	1
JEFFERSON	11	16	13	TUCKER	1	1	1
KANAWHA	182	175	192	TYLER	0	0	0
LEWIS	3	2	1	UPSHUR	1	4	1
LINCOLN	1	2	2	WAYNE	5	3	4
LOGAN	9	6	8	WEBSTER	0	1	2
MCDOWELL	1	4	1	WETZEL	1	3	3
MARION	11	9	10	WIRT	1	0	0
MARSHALL	2	0	3	WOOD	19	17	12
MASON	2	7	3	WYOMING	3	1	0
MERCER	22	23	11	-----	-----	-----	-----
-----	-----	-----	-----	TOTALS OF ALL COUNTIES FOR EACH FISCAL YEAR	FY 2002 484	FY 2003 465	FY 2004 464

## **Early Dispute Resolution Programs**

### **The Pre-determination Conciliation Program**

What is the Pre-determination Conciliation Program?

The Pre-determination Conciliation Program offered by the West Virginia Human Rights Commission serves as an efficient and time-saving method to resolve complaints early in the investigatory process. The process involves a trained Conciliator who is employed by the West Virginia Human Rights Commission. The Conciliator acts as a facilitator to help the participants arrive at a negotiated settlement resolution. The decision to Conciliate can be voluntarily requested by any party involved in the complaint. The West Virginia Human Rights Commission may also request the parties to participate in a voluntary conciliation.

When does conciliation occur?

After a charge is filed, any party may request Conciliation at any time prior to the Commission's issuance of a determination. The Commission, after reviewing the charge and information obtained during the investigation, may determine that the involved parties could benefit from the Pre-determination Conciliation Program and inquire as to whether the parties would be interested in Conciliation negotiations.

What are the advantages of pre-determination conciliation?

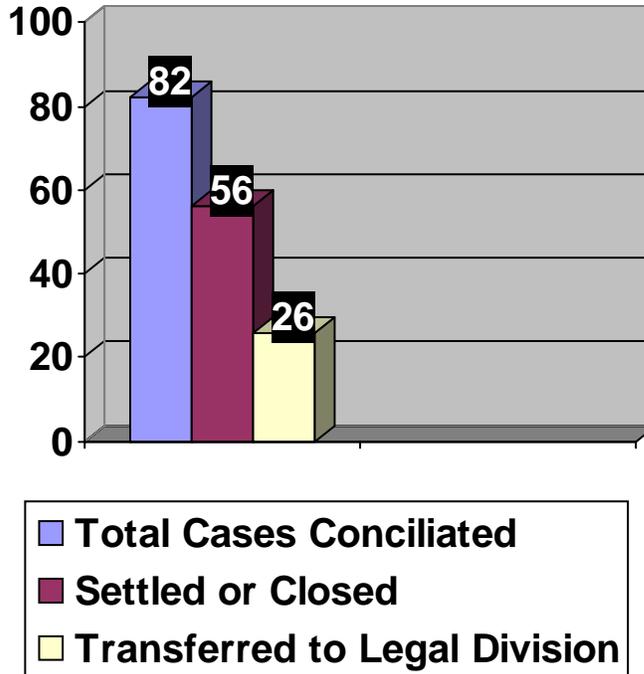
Pre-determination Conciliation is a fair and confidential process during which a mutually acceptable agreement may be reached, thereby avoiding time consuming litigation. This program is a free service offered by the Commission.

What happens if a settlement is not reached?

If the charge is not resolved, the case is returned to the Investigative Unit for the completion of the investigation. Upon completion of the investigation, the Commission will issue a determination of either No Probable Cause or Probable Cause.

If the parties are interested in participating in a Pre-determination Conciliation, please contact the West Virginia Human Rights Commission at (304) 558-2616.

## Pre-Determination Conciliation For Fiscal Year 2004



A total of \$228,480 were received by the complainants as a result of case settlements through the West Virginia Pre-Determination Conciliation Program. This was an increase from Fiscal Year 2003 when the complainants received \$53,522 in monetary settlements.

An increase in the number of cases conciliated was realized in FY 2004 when 82 total cases were conciliated in comparison to 55 total cases in FY 2003.

A total of 70% of the cases that reached the conciliation process were settled or closed in FY 2004. This also marks an increase from 46% of the cases that were settled or closed in FY 2003.

The West Virginia Human Rights Commission's Pre-Determination Conciliation Program continues to be a successful program in resolving complaints in a satisfactory and timely manner.

## **Early Dispute Resolution Programs Fiscal Year 2004 Mediation Program**

Through education, investigation, pre-determination conciliation, mediation, and adjudication, the West Virginia Human Rights Commission continues processing every case in a timely manner without jeopardizing the interest of any of the involved parties. The Agency's mediation project continues to increase yearly in volume and proves to be a highly effective tool in following through with the promises of the Executive Director's Mission Statement.

Mediation has proven to be an efficient, time-and-money saving alternative to the hearing or litigation process and has resulted in a fair and confidential process through which settlement agreements have been made via mutually accepted resolutions of cases.

Mediation may be voluntarily requested by the parties, or ordered by an administrative law judge or Executive Director pursuant to the Rules of Practice and Procedure before the West Virginia Human Rights Commission, 6 W. Va. C.S.R. § 77-2-4.15. When a charge is filed and a probable-cause determination is found through investigation, an administrative law judge will set the matter for a public hearing. Previously, it was felt that only those cases set for hearing which could possibly benefit from mediation were so ordered. However, the Commission's project has grown to an extent that its present goal is to schedule every case docketed for public hearing to Mediation.

A State Bar-trained mediator, acts as the facilitator for the participants in an attempt to arrive at a negotiated resolution. This is a fair and confidential process which averts time-consuming and unnecessary litigation and is provided fee-free to the participants. If the matter is not settled at mediation, the parties may opt to continue in circuit court or proceed to the previously set public hearing.

If the parties reach a settlement and execute a written agreement, this agreement is enforceable in the same manner as any other written contract. The West Virginia Human Rights Commission is proud to be a leader in utilizing this tool in order to present the parties an opportunity to resolve differences effectively and in an efficient manner.

Because parties to the cases and mediators do not all reside close to the Commission's locale, many cases are handled at mediators' offices throughout the state. This has saved time and money for the participants because previously all cases were mediated in Charleston. With this new approach, the Commission has been able to utilize more mediators around the state and less travel is involved on the part of the participants.

Requests for information concerning the project may be directed to the Mediation Coordinator at the Commission's address and phone numbers or by e-mail: [wvhrc@wvdhhr.org](mailto:wvhrc@wvdhhr.org).



## **Early Dispute Resolution**

### **Mediation**

### **Fiscal Year 2004**

### **Calendar Year 2003-2004**

In the Fiscal Year 2003, the Mediation program yielded settlements in the amount of \$420,977.45. In contrast, in Fiscal Year 2004 the Mediation Program has experienced an increase in settlement amounts to 1, 472,430.20. This is an increase in excess of \$1,000,000 from Fiscal Year 2003.

### **When Settlements Are More Than Money**

Monetary settlements are not the only settlements that can be a solution to settling a complaint through the mediation process. The following are examples of non-monetary settlements that were reached through the mediation process during the 2004 Fiscal Year.

In a case involving a disability the respondent agreed to make improvements to bring a state park into compliance with applicable state and federal laws. The respondent agreed to make adjustments to their public rest rooms. These adjustments include such changes as: lowering mirrors, installing handrails at the proper height and distances, adjusting and lowering plumbing fixtures in bathroom sinks. The respondents also agreed to make adjustments to the fishing piers to allow disabled persons with wheelchairs and other walking aids to access the fishing pier.

Another disability case involved a city that was a respondent in a public accommodation case. The city agreed to make improvement in the city sidewalks such as: constructing sidewalk curb ramps that would make running slopes and cross slopes properly accessible to wheelchairs pedestrians and persons with other walking devices.

In other cases the Respondent agreed to settle the complaint by installing and maintaining telecommunication devices for the hearing impaired at interstate rest stops and welcome centers. These devices were teletypewriters, (TDD/TTY's).

The mediation program also settled cases that involved the respondent agreeing to provide anti-discrimination training to their employees, revising the anti-discrimination policy and the posting of such policies throughout their premises. Respondents also agreed to revise their procedures of hiring practices, their application procedures and retention policies.

An employer also settled a complaint by revising their medical evaluation forms to avoid violations with the Americans With Disabilities Act.

Often, monetary awards are not what the complaints are attempting to gain from filing a complaint with the West Virginia Human Rights Commission. Many times the West Virginia Human Rights Commission and the complainant desire that something that may be in violation of the West Virginia Human Rights Act be corrected. The result is a permanent change for the respondent that will perhaps prevent future complaints filed about the same or similar issues.

The mediation program of the West Virginia Human Rights Commission has been one of the most successful programs established to bring an early resolution to a complaint. An early resolution to a complaint saves time and money to all parties involved. It appears that the Mediation Program will have a most prosperous future in bringing a satisfactory resolution to many complaints.





# **West Virginia Human Rights Commission**



## **Selected Case Summaries of the Final Orders and Decisions of the West Virginia Human Rights Commission For the Fiscal Year 2004 (Calendar Year 2003-2004)**



**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE  
AND FINAL ORDER OF THE COMMISSION IN THE MATTER  
OF  
WILLIAM L. TURNER V. KANAWHA COUNTY BOARD OF EDUCATION  
DOCKET NO. ERA-170-00**

The West Virginia Human Rights Commission upheld a Final Decision of an Administrative Law Judge which held that Coach Turner had been subjected to racial harassment culminating in his being placed on a Plan of Improvement in January 1998 to prevent him from applying for a position as Head Basketball Coach at Riverside High School while teaching and coaching at East Bank High School; and, again subjected to racially harassment culminating in his constructive discharge from Riverside High School after being placed on a second Plan of Improvement in March 2000. Coach Turner has been a teacher for Kanawha County Board of Education since 1963 and a coach in various sports and capacities since 1968. Coach Turner transferred to East Bank High School in the middle of a semester in 1976 following a race riot

The Administrative Law Judge concluded that the reasons advanced by Respondent for placing Coach Turner on a Plan of Improvement in January 1998 were pretextual. When he reported for work in the Fall of 1997 his Department Head changed the summer reading assignment he was to test his students upon from that which he had been given. He noticed that he was getting more disciplinary problems particularly from the JROTC students and that Assistant Principal Bossie would not impose appropriate detention hall or suspensions for the students he wrote up. A fellow teacher testified that where a typical class would have one or two troublemakers, Coach Turner was assigned a full class of 25 such students, who believed that if they did anything wrong in Coach Turner's class, they would not be punished.

Prior to 1997, Coach Turner had never been rated unsatisfactory in any category of any evaluation. On December 11, 1997 he received unsatisfactory ratings in all six areas evaluated; yet the no suggestions, recommendations or identified deficiencies appeared in any of those sections of the evaluation form and the comments sections contained the same general concerns identified in the comments section from the prior two years evaluations resulting in all satisfactory ratings. One of the administrators who was to monitor the Plan of Improvement, lied on a form claiming that Coach Turner had not prepared four weeks of lesson plans; while the records showed he had (while another teacher not on a plan of improvement had failed to submit the prior seven weeks of lesson plans), whereupon Ms. Daniels subsequently "found" the four weeks of lesson plans. Contrary to policy, Coach Turner was kept on the Plan of Improvement beyond the end of the semester according to the Summative Evaluation for the first nine weeks of the Fall 1998 Semester, which precluded his application for Head Basketball Coach at Riverside High School. Ms. Daniels' husband was an applicant for the basketball coaching position.

Subsequently, Coach Turner was hired as a Social Studies teacher at Riverside High School when it opened in the Fall of 1999. He was subjected to racial harassment which resulted in the creation of such a hostile environment as would cause any reasonable person to quit. Therefore the Administrative Law Judge found that he was constructively discharged. Lesson plans were deleted from the school computer and removed from a locked file cabinet. Students were given wrong grades from those he submitted for two out of his three courses. Ms. Daniels, an Administrator, instructed him to give an entire semester's worth of make up work to a student who did not return to school until the last two weeks and give him a grade, while other white teachers were given other instructions, when he objected this was used as a basis for a bad observation. When Coach Turner attempted to have a parent teacher conference to address a student's behavior, who had slammed a desk down and swore, while attempting to incite a student walk out; Ms. Daniels had multiple parents in and shifted the focus to bashing his teaching rather than address the bad behavior, allowing that student and parent to leave without ever having taken up the issue. That student later was caught with stolen hall passes upon which an African American teacher's signature had been forged. When confronted, the student lied to the teacher's face saying you signed it, apparently having learned that a white student's word would be believed above that of any African American teacher. The Administrative Law Judge noted that only three of the sixty-nine teachers employed by the Principal at Riverside High School were African Americans. That Principal, had been the same one who imposed the Plans of Improvement at both East Bank High School and at Riverside High School. The Administrative Law Judge awarded back pay of \$50, 222.00 through the end of the 2002-2003 school year and should Coach Turner not be reinstated, \$81,450 net of retirement pay, as discounted for present value through the end of March 2005, when Coach Turner would have retired from teaching at age 65. The Administrative Law Judge further awarded \$12,500 in back pay and front pay as Head Basketball Coach through 2004-2005 and \$3,277.45 incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity. The West Virginia Human Rights Commission upheld the decision of the Administrative Law Judge without changes.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
**IN THE MATTER**  
**OF**  
**ORVILLE J. COTTRELL V. AMERICAN ELECTRIC POWER**  
**COMPANY DOCKET NO. EH-100-99**

Complainant works as a maintenance mechanic for the Respondent at their John Amos Power Plant. Mr. Cottrell is a brittle diabetic. In 1998 the Respondent went from set shifts which included the eight hour, five day per week day shift that Complainant worked, to rotating shifts. The Complainant requested an accommodation in July 1998, to be placed on a regular eight hour day shift after his Doctor advised him that his medical condition was significantly worsened by the disruption in his routine and the longer shifts he was required to work. The Respondent never discussed the requested accommodation of Mr. Cottrell's disability, even after it received his Doctor's report concerning the severity of his condition and the necessity for the accommodation. In his evidentiary deposition, the Doctor indicated that Complainant required insulin shots two times per day when he worked the eight hour day shift, whereas he was required to take up to six to eight shots when he worked the rotating shifts. The Respondent ultimately placed Mr. Cottrell back on day shift when they again reorganized in June 1999 based upon his seniority, not as a reasonable accommodation.

The Administrative Law Judge held that Respondent was required to place Complainant on the day shift as a reasonable accommodation and made several significant interpretations of the West Virginia Human Rights Act as it relates to issues involving reasonable accommodation cases of disability discrimination under the Act.

The Administrative Law Judge held that Mr. Cottrell's brittle diabetes is a physical impairment that substantially limits several life activities including his ability to physically ingest food. He is limited in what, when and how he eats. Although eating is not one of the major life activities specifically listed in the West Virginia Human Rights Act or the Legislative Regulations promulgated by the West Virginia Human Rights Commission to enforce the Act, the Administrative Law Judge reasoned that it nevertheless constitutes a major life activity just as a Federal Appeals Court had ruled it does under the ADA, where it similarly is not specifically listed. The Administrative Law Judge analyzed the standard for assessing what constitutes an undue burden upon the Respondent in whether it is required to undertake a particular accommodation and explained that the issue is to be determined on a case by case basis depending upon the particular nature of the Respondents operations and the costs associated with the requested accommodation in relation to the ability of the Respondent to meet the burdens and costs associated with the request in light of the Respondents circumstances. The Administrative Law Judge held that it was not an undue burden upon Respondent to place the Complainant on a day shift schedule where the Respondent employed five teams of 52-56 employees each in its production operations, with 10-12 maintenance mechanics per team. The Administrative Law Judge noted that the Respondent had failed to engage in a dialogue with Mr. Cottrell concerning his need for an accommodation as required by the West Virginia Supreme Court's cases interpreting the duties imposed for reasonable accommodation requests under the West Virginia Human Rights Act.

The Administrative Law Judge awarded Mr. Cottrell \$3,277.45 in incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity; and the Commission's costs in prosecuting the case in the amount of \$699.75 and the Civil Rights Division's costs of \$23.46. The decision of the Administrative Law Judge was not appealed to the West Virginia Human Rights Commission.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE  
AND FINAL ORDER OF THE COMMISSION IN THE MATTER  
OF  
BEVERLY L. WATTIE, on behalf of KW  
a minor child V. BARBARA COBB,  
in her individual capacity DOCKET NO. PAR-282-01**

Complainant, was the mother of a minor child at the time of the Public Hearing, who complained that her child had been racially harassed and retaliated against by a teacher at Riverside High School. The Administrative Law Judge found that Respondent teacher had repeatedly sent Complainant KW to the office whenever she asked a question or talked like other students. Two other African American students would similarly be fussed at although not repeatedly sent to the office. When Complainant missed a class the Respondent refused to give her make up assignments until another teacher or administrator would intervene. On one occasion, Respondent took out a pad of post it notes and told another African American student, "Yes, I have some, but you'll have to ask someone else for it.", and placed it back in her desk. Principal Clendenin admitted that Respondent was in conflict with the African American students in her second semester 9<sup>th</sup> Grade English Class. He suggested that the solution would be to remove the African American students from the class. Ms. Wattie refused to have her child removed as a solution. During the first nine weeks of class, KW had a B in the class, even though she was number one in the class as far as the graded assignments, KW earned an A in the class when the course was taken over by other teachers following Respondent's leaving that year due to serious health problems. Respondent on one occasion locked KW out of the classroom for being tardy, and called another African American's parent in front of the whole class and made a disparaging comment to her when that student attempted to unlock the door for KW.

In the subsequent years, further incidents occurred during the course of Respondent's hall monitoring duties resulting in constant referrals to the principal's office for being in the hall during jump start period and for being too loud in the hall during class changes. Following a verbal exchange in the restroom at the High School during a school play, KW allegedly shouldered Respondent out of her face and Respondent attempted to have KW arrested for assault and battery. Respondent attempted to have KW removed from the Health Science Technology Academy and made racially disparaging comments to the teacher in charge of the program, who is of Pakistani national origin. Respondent was subsequently suspended from teaching duties for insubordination when she challenged the procedures for selecting KW as a participant in College Summit. Respondent bristles at the academic honors earned by KW and at her being named one of the outstanding African American students at Riverside High School. KW had a 4.0 GPA for the current school year at the time of Public Hearing and a cumulative 3.6 GPA for her career.

The Administrative Law Judge held that the Respondent, Barbara Cobb had engaged in racial harassment of KW and retaliated against her for complainant of the harassment. The Administrative Law Judge ordered the Respondent to cease and desist from discriminatory behavior, awarded \$500.00 in incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity of KW, and costs associated with prosecution of the matter before the Commission. The West Virginia Human Rights Commission upheld the decision of the Administrative Law Judge without changes.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE  
AND FINAL ORDER OF THE COMMISSION IN THE MATTER  
OF  
RUDOLPH WELLINGTON LEE, JR. V. CANEY CREEK  
CONTRACTING, INC. DOCKET NO. ERREP-341-99**

Complainant is an African American. Mr. Lee received his certification in welding from Ben Franklin Career and Technical Education Center in 1996a after completing a 1320 hour course, and obtained certifications for two welding tests. Respondent provides temporary employees to various mining and construction facilities, including providing staffing for other companies under the direction and control of Caney Creek President Dick Smith. Two of those companies are West Virginia Steel and Superior High Wall Mining or SHM. Complainant was hired by Respondent on August 21, 1998. He was placed at West Virginia Steel as a contract employee and worked there from August 21, 1998 through October 30, 1998 after passing the welding test administered by West Virginia Steel.

A month later Respondent called Mr. Lee and referred him to work at SHM. Respondent's senior management employees admitted that they were jointly responsible for the supervision of their employees when referred to SHM. It was further admitted that job assignments, job oversight and each and every realistic aspect of Mr. Lee's supervision at SHM was conducted by SHM's management employees on the job site. Complainant was the only African American at the SHM work site when he reported for work on November 23, 1998. Respondent has not referred any other African Americans to the SHM site since it assigned Mr. Lee there in 1998, although Respondent continues to supply temporary workers to SHM.

The Administrative Law Judge found that Mr. Lee was subjected to severe and pervasive conduct which created a racially hostile work environment at SHM. On one occasion Mr. Lee found a noose made of rope hanging from his tool box at his work station bay. On another occasion, a white co-worker, Mr. Haggerty, found Mr. Lee's drop cord tied in a noose in Mr. Lee's work bay when they returned from eating lunch. Mr. Haggerty and Complainant rode together. From the very start of his placement at SHM, Mr. Lee was not given any instructions as to how to do the work, unlike his co-workers, who were told piece by piece what they were supposed to do. When Mr. Lee would see his co-workers talking in a group and approach them, they would immediately disperse. When SHM went to two shifts, Mr. Lee was transferred to the night shift without being given the option. An SHM supervisor of the night crew, stated to those assembled, "We got some nigger shit to do tonight, men". Mr. Lee was standing next to Mr. Haggerty when this offensive slur was used. At one point, the Complainant had been required to come to work while he had pneumonia and required oxygen, or he would be fired. Clinton Clevinger, another supervisor at SHM, continually referred to Mr. Lee as LeRoy, even after Mr. Lee told him that term offended him and Mr. Clevinger was aware that his nickname was Rudy. Mr. Haggerty was called "nigger lover" because he associated with Mr. Lee. Mr. Haggerty stated that no one wanted to work with Complainant other than himself. The day after Mr. Lee was terminated from SHM, Respondent placed a white man named Bo at SHM, who called Mr. Haggerty "nigger lover". The least desirable job assignments were given to Mr. Lee when he worked there even though others were less senior. Mr. Haggerty further testified that he continued to work at SHM following Mr. Lee's termination even though his welding skills were inferior to those of Complainant and he was less senior, having been hired in later as a painter and later given welding assignments.

The Administrative Law Judge held that Respondent was liable for subjecting Complainant to a racially hostile work environment as it was jointly responsible for supervision of its employees assigned to work for SHM. The Administrative Law Judge found that the explanations given by Respondent for the termination of his employment with SHM were pretextual. Mr. Lee had successfully passed the welding exam at West Virginia Steel and worked there without complaints. The Respondent offered various conflicting explanations regarding his lay off to different entities at different times. The Respondent stated to unemployment that he was laid off due to lack of work. The Respondent at one point explained that Complainant could not weld or paint, and that he came to work drunk. Complainant does not drink alcohol.

The Complainant did not complain to those at SHM about the racial harassment because he was afraid he would lose his job. When he was terminated he did complain to Respondent's management employees about the treatment he had been subjected to. The Respondent did not do anything to investigate the situation. Respondent has not referred any other African Americans to work at SHM but continues to supply temporary workers to SHM. Despite stating to Mr. Lee that they would refer him as other jobs became available, Respondent failed to do so. At the Public Hearing the Respondent admitted that it "was not in its interest" to refer Mr. Lee after it had received his West Virginia Human Rights complaint. Thus the Administrative Law Judge ruled as a matter of law that Respondent was liable to Complainant for retaliation under the West Virginia Human Rights Act.

The Administrative Law Judge awarded Mr. Lee back pay less mitigation in the amount of 32,675.20, ordered he be referred to the next available welding assignment and given front pay until that time. Mr. Lee was also awarded \$3,277.45 in incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity. The Commission was awarded its reasonable costs incurred in prosecuting the case in the amount of \$965.50, and the Attorney General's Civil Rights Division travel expenses incurred in the amount of \$44.60. The West Virginia Human Rights Commission upheld the decision of the Administrative Law Judge without changes.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE  
AND FINAL ORDER OF THE COMMISSION IN THE MATTER  
OF  
PETER KELLEY, III, OCTAVIA E. BINDER, KERRY L. WALKER,  
TIMOTHY E. BOYKINS, SHERRI THOMAS AND ANDREA THOMAS-PAULEY V.  
HEETER CONSTRUCTION COMPANY, DOCKET NOS.  
ERS-185-01, EAR-189-01, ERS-190-01, ERS-191-01, ERS-252-01 AND ER-253-01**

Complainants were African Americans who applied for positions as rock truck drivers or flaggers on a road project widening Route 10 in Man, West Virginia and were not hired. The Respondent claimed that it did not discriminate against African American applicants, but rather did not hire them because it only hired individuals who the owner or his trusted business associates knew and recommended as able to perform the extremely hazardous work. The Administrative Law Judge ruled that the Commission had proven by a preponderance of the evidence that this explanation was pretextual for discrimination based upon the inference drawn from the fact that no African Americans were hired by Heeter Construction Company for the State funded project 14, which had no minority recruitment requirements; while Respondent was able to find qualified African American applicants from such references for the Federally funded project 15, which did have EEO affirmative Action requirements, with minority and female recruitment goals. Applying the shifting burden of proof under the mixed motive cases, where the complainants have demonstrated that an impermissible discriminatory motive played apart in the adverse employment decision, the Administrative Law Judge found that the Respondent had proven that even in the absence of considering the impermissible factor of race, Respondent would not have hired Complainants, Kerry Walker and Sherri Thomas as flaggers due to the virtual absence of or gaps in the recent employment history on their applications; and, with respect to Andrea Thomas-Pauley, who applied for a rock truck driver position, without any experience driving large rock trucks. Although, Respondent had hired another man with no experience driving rock trucks, that individual was not deemed to be similarly situated given the fact that he was the son of a long time employee who asked the owner to allow him to train his son on his own without pay until he was ready to work.

The Administrative Law Judge awarded all six Complainants \$3,277.45 in incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity associated with the racial discrimination in the application process. Additionally, the Administrative Law Judge awarded back pay, less mitigation, in the amounts of \$62,331.98 to Peter Kelly for failure to hire him as a rock truck driver due to his race; \$70,463.41 to Timothy Boykins for failure to hire him as a flagger due to his race and sex,; and \$12,369.11 to Octavia Binder for failure to hire her as a flagger due to her race and age. The Commission was awarded its reasonable costs incurred in the prosecution of the case in the amount of \$6,408.60 and the Attorney General's Civil Rights Division its reasonable expenses in travel of \$120.28. As part of the cease and desist order, Respondent, Heeter Construction Company was required to report to the West Virginia Human Rights Commission on the total number of applicants by race for its projects employing more than 12 persons, and the successful applicants that it hires.

The Administrative Law Judge's Final Decision was upheld by the West Virginia Human Rights Commission with the minor revision that deleted the requirement that the Respondent's sister corporation also report.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
**IN THE MATTER**  
**OF**  
**SHERRY LYNN GILKERSON V. CABELL HUNTINGTON**  
**HOSPITAL DOCKET NO. ED-386-00**

Complainant started working for the Respondent as an LPN in February 1989; and earned her Associates Degree in Nursing in 1996, at which time she became an RN. From 1996 to 1998, Ms. Gilkerson worked for the Respondent in its Medical Surgical Unit as an RN. On December 5, 1998 the Complainant injured her back at work and sustained chronic and acute cervical and lumbo-sacral spine sprains. She was taken off work for an extended period of time. She briefly returned to work and re-injured the back. Following the re-injury she was diagnosed with several ruptured discs in the back, and again taken off work. Respondent Hospital was not informed of her release to return to work until November 4, 1999, with a vague reference to light/medium category of work. Respondent was not made aware of the specific 35 lb. lifting restriction until December 8, 1999 and further not informed of Complainant's willingness to accept a casual employee position until December 28, 1999. There had been many phone calls in between that time during which Complainant had indicated that she expected to be placed in a full time position and would not accept a part time or casual position with Respondent. The parties stipulated that Nurse Gilkerson is a qualified individual with a disability and the Respondent and Complainant agree that the only nursing position which Ms. Gilkerson can perform with the indicated restrictions is that as an RN in Respondent's Natal Intensive Care Unit or NICU.

The Administrative Law Judge found that by stipulating to the fact that Complainant as a qualified person with a disability, Respondent admitted that it owed a duty to Complainant that it would provide a reasonable accommodation to place the Complainant back to work within a reasonable time. The factors to be considered as to whether the employer has acted to reinstate the employee within a reasonable time include; the length of the delay, the reasons for the delay, whether the employer offered alternative accommodations in evaluating the particular request and whether the employer acted in good faith. The evidence indicated that two positions

were posted and filled for full time RN in the NICU; while Ms. Gilkerson was still off from work on sick leave and that a part time RN was given full time RN position in NICU also while Ms. Gilkerson was on sick leave. Ms. Gilkerson was hired for casual employment as an RN in the NICU on February 28, 2000 and placed in a full time RN position in Respondent's NICU on June 25, 2000. The Administrative Law Judge concluded that Respondent had met its duty to accommodate the Complainant's disability within a reasonable time by placing her in a casual RN slot within three months of learning of her willingness to accept the position, and then placing her in the next available fulltime RN position in the NICU. The Administrative Law Judge dismissed the case against the Respondent with prejudice and struck the matter from the docket.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
**IN THE MATTER**  
**OF**  
**CLARENCE SCOTT V. DAVIS & BURTON**  
**CONTRACTORS, INC. DOCKET NO. EAR-18-02**

The Complainant is an African American with twenty one years in the Laborer's Union. Respondent provides contracting services at the John Amos plant. They are responsible for appointing the project Superintendent, who in turn tells the Union Foremen what to do. Mr. Scott was referred out by the Local on February 22, 2001 and terminated on April 24, 2001. On his first day on the job, Mr. Scott borrowed some pliers during his lunch break to wire down the hood of his car. He was called in to the office of the general Foreman when the pliers were discovered missing. After Mr. Scott explained why he borrowed them he was permitted to use them to wire down the hood of his car and he was not disciplined in any fashion.

Complainant worked on a project at the John Amos Plant, out of a trailer where there were twelve Laborers and Carpenters, and two Safety Men; all of whom other than Complainant were white, including the Superintendent for the project, Carl King. In just a two month period, Complainant was subjected to a derogatory racial slur, being called "lightning" by a co-worker; having a person referred to as a "black bitch" in his presence; and, having to complain to Mr. King to obtain overtime assignments as given the white employees. Mr. Scott was also threatened with physical violence by two large white co workers in the lunch room who said they were going to "whip his ass" and threw things around the lunch room, which resulted in his ceasing to utilize the lunch room. When Complainant went to Superintendent King to complain of the racially hostile environment, Mr. King stated, "I don't want to hear that black shit in my office!"

When Complainant was laid off he did not file a grievance because Mr. King had told him he would be called back to work in three days. When he was not called back, Mr. Scott went to see the Union Local's Business Manager, who informed him that he had received a "no-recall" letter from Respondent signed by Carl King, alleging that Respondent would not be recalling Complainant for employment because he was not dependable, reliable, or trustworthy. Although Respondent also sent no-recall letters on two white union members, those were for being undependable, i.e. not showing up for work, and another for unsatisfactory work. Complainant was never late for work, never missed a day, was never written up or disciplined for anything when he worked for Respondent at the John Amos Plant. Mr. Scott was subsequently hired by PMI to work at the John Amos Plant and made Foreman, supervising ten people. Furthermore, Respondent had reported Mr. Scott's lay off as a "good lay off" to Unemployment. After Mr. Scott filed his West Virginia Human Rights complaint, the Respondent's called the Superintendent and Shop Steward in to sign statements concerning Mr. Scott's alleged "theft" of the pliers, these documents were never given to the Complainant who had of course never been disciplined in any fashion regarding the incident.

The Administrative Law Judge held that the Complainant had been subjected to a racially hostile workplace because the incidents were severe enough to warrant his inability to use the lunch room, and pervasive, in that the incidents occurred in such a short period of time, and that they were imputable to the Respondent, in that when he complained to the Superintendent, the Superintendent refused to investigate or take any action regarding the racial discrimination of which Mr. Scott complained. The Administrative Law Judge further held that the reasons advanced by Respondent for the no-recall letter were pretextual for racial discrimination and or retaliation for his complaints to Mr. King. The Administrative Law Judge awarded Complainant back pay net of mitigation in the amount of \$40,962.24; and, \$3,277.45 in incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity. The Administrative Law Judge awarded the Commission its reasonable costs incurred in the prosecution of the case in the amount of \$305.25.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
**IN THE MATTER**  
**OF**  
**STEPHEN BAILEY V. PARDEE RESOURCES GROUP, INC.**  
**DOCKET NO. ED-360-01**

Complainant worked for Respondent as a draftsman/autocad technician from October 20, 1999 until his employment was terminated on April 5, 2001. Mr. Bailey's duties involved creating maps on the computer. Mr. Bailey was injured in a car accident in 1990 and has physical injuries stemming from fractures of the left tibia and fibula, fracture of the right humerus and fractures of the vertebrae. He was awarded full disability by Social Security. Complainant walks with a visible limp and wears a leg brace. He also occasionally utilizes a cane to walk.

Respondent, through one of its Senior Vice President, was aware of Mr. Bailey's physical limitations at the time it hired him. Respondent did not require Mr. Bailey to work in the field. Respondent detailed many deficiencies in the Complainant's work which it described as mediocre, slow and not very meticulous. One occasion Mr. Bailey produced a property map which left half the relevant properties off of the map. Another instance cited a final draft of the map contained misplaced property lines, property lines mapped as roads and a misspelling of the word boundary. The Senior Vice President in charge of Pardee Resources Group, Inc, Oil and Gas Division, refused to work with Mr. Bailey due to the poor quality of his work. The individual who worked with Mr. Bailey, described the situation where he would go over the maps produced, give them back with corrections to be made, only to have the process repeated over and over, with new errors where the map had previously been correct. Complainant had several meetings, both formal and informal to discuss the quality of his work, overall work attitude and inability to work without close supervision. Mr. Bailey did not learn the naming system used by Respondent as a means of assisting employees in finding maps that had been created, which would have prevented many of the mistakes he was making.

The Administrative Law Judge held that Mr. Bailey was terminated because of his poor work performance and not because of his disability, based both upon the fact that the Respondent was aware of his condition when it hired him and because of the absolute absence of any evidence of discrimination such as disparaging remarks, comments or behavior directed at Mr. Bailey. This is in contrast to the abundance of evidence of the poor quality of Complainant's work product. The Administrative Law Judge further noted that although Complainant had speculated that he was terminated because Respondent planned to change his duties which would have required an accommodation of his disability, there was no direct or circumstantial evidence presented to support such a supposition. . The Administrative Law Judge concluded that Complainant had failed to establish the elements of a claim for failure to accommodate under the West Virginia Human Rights Act. The Administrative Law Judge held that 77 C.S.R. 1 § 3.1 requires that when the Respondent disputes that the Complainant is a person with a disability or the nature of the impairment at the time of the Public Hearing, the burden of proof is upon the Complainant to present by reasonable medical opinions or records, the nature of the disability; any limitations caused by the disability; and, any restrictions upon the disabled individual's work activity. No such medical opinions or records were tendered into evidence. The Administrative Law Judge dismissed the case against the Respondent with prejudice and struck the matter from the docket.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
**IN THE MATTER**  
**OF**  
**DEBRA K. PARKER V. RETINA CONSULTANTS, PLLC**  
**DOCKET NO. ESREP-252-02**

Complainant is a 38 year old female, employed by Respondent as a Retinal Photographer, since February 1999. Complainant was a high school graduate, with extensive work experience in the field of photography, including working as a manager of Foto 1 and then Fast Foto for several years. The Fast Photo closed after the owner refused to renew the lease on the building. The Complainant was earning \$15.00 per hour at the time as manager, but accepted the position with Respondent for \$7.50 per hour when Respondent's Practice Administrator refused her request to start her at \$9.00. Ms. Parker was the only female Retinal Photographer employed by Respondent for several years until after she filed a complaint with the West Virginia Human Rights Commission, alleging gender based wage disparity, and just before the case went to Public Hearing.

The complaint alleged that she was paid significantly less money than were the various male Retinal Photographers employed by Respondent; and was filed after Complainant learned that a male retinal photographer with no experience, who worked for Respondent for six months, had been paid \$11.00 per hour. The Administrative Law Judge held that the explanations offered by Respondent for the disparity in pay for work as the Retinal Photographer were pretextual for gender based wage discrimination. The Administrative Law Judge accepted the explanation that certain Retinal Photographers had additional value to the Respondent in terms of providing information technology services and in acquisition and installation of certain digital equipment, including digital cameras, computers and Ocular Coherence Tomography. The Administrative Law Judge concluded that higher education per se had no influence on the wage paid to Respondent's Retinal Photographers, both based upon the fact that education was not a requirement for the position, and individuals with all sorts of varied educational backgrounds performed the duties of Retinal Photographer. The fact that Respondent brought on a female Retinal Photographer at a wage exceeding other "key employees", was unpersuasive given the fact that the hire occurred well after the complaint had been filed, just before the start of the Public Hearing, and because the hire was a personal friend of Dr. Hatfield, who started the Respondent business, Retina Consultants, PLLC, as she had served as the Youth Minister at Dr. Hatfield's church.

The Administrative Law Judge found that the short term employee, Mr. Price was the most appropriate comparator and determined that Ms. Parker should have been hired in at \$9.94 per hour had she not been subjected to unlawful gender based discrimination. The Administrative Law Judge ordered Respondent to pay back pay in the amount of \$11,901.77;

and raise her current pay by \$2.44 per hour. The Administrative Law Judge did not award incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity because the Complainant offered no testimony or evidence of these types of damages at hearing. The Administrative Law Judge did award reasonable costs incurred in the amount of \$4,062.00 and reasonable attorney's fees in the amount of \$22,600.00 incurred in the prosecution of the case.

**A FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE,**  
**FINAL ORDER OF THE COMMISSION AND**  
**DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS**  
**IN THE MATTER OF**  
**PATTI A. SMITH V. UNITED PARCEL SERVICE**  
**DOCKET NO. EH-57-98**

After reviewing the record developed to date, the initial Final Decision, and taking additional evidence as necessary, the Administrative Law Judge issued the Administrative Law Judge's Amended Final Decision In Response To Commission's Remand Order. The Commission sought additional factual findings related to the issues of whether the Complainant was a person with a mental or physical impairment which substantially limited one or more major life activities, whether she could perform the essential functions of the position with Respondent, what the date of accrual of back pay would be, and what the measure of incidental damages should be awarded; because an earlier Judge's decision had failed to adequately explain that Judge's conclusions of law with factual findings related to those issues.

The Complainant had worked for the Respondent for a number of years as a warehouse employee performing duties involving the loading and unloading of trucks and sorting packages. These duties did not involve interacting with the public or working in an unstructured environment. Later Ms. Smith worked for Respondent as a Package Delivery Car Driver, which did involve working with the public and dealing with unstructured environments which required adaptability on the part of the Complainant. After being injured in an automobile accident and undergoing a hysterectomy, Ms. Smith developed significant psychiatric problems. The overwhelming medical evidence established that Ms. Smith suffered from Major Depression and other conditions which resulted in rigid and repetitive behavior, inability to sleep properly, irrational suspicion of others and inflexibility in matters of judgment. The Complainant's psychotherapist had issued a letter dated April 7, 1995 in which he requested the Respondent employer to make a reasonable accommodation for Complainant by assigning duties which would place her in a structured work environment and would not involve her in dealing with

variables beyond her control such as traffic, congestion or dissatisfied customers. On May 5, 1995 Complainant made a request to return to work in her former capacity in the warehouse when she submitted a Doctor's letter stating that she should immediately be reassigned to a posting which duties do not include driving a motor vehicle and filed a grievance on that date as well. Ken Hall was the Business Agent for the Teamster Union Local 175, and assisted Ms. Smith in her problems with UPS. He indicated that he had extensive discussions with the Respondent's management in May and June 1995 trying to get the Respondent to assign her as a loader/unloader in the warehouse. Because Ms. Smith did not have sufficient seniority to bump any of the full time warehouse workers, he requested that Ms. Smith be given full time benefits but work two back to back part time shifts as loader/unloader in the warehouse as had been done to accommodate the needs of at least three other people with physical restrictions.

The Administrative Law Judge found that the Complainant had a psychiatric condition which substantially limited her major life activities of working and sleeping. The Independent Medical Evaluator agreed upon by the union and employer under the labor agreement had concluded that the Complainant was unable to work as a package delivery car driver but that she was able to perform structured work with UPS such as that of the warehouse workers. The psychotherapist opined that Ms. Smith could not work in positions which would require her to interact with the public, such as sales positions. Virtually all the medical testimony and evidence agreed that Complainant needed to work in a structured rather than unstructured environment to eliminate stressors. The Rehabilitation Coordinator testified that this would eliminate approximately 22%-25% of the jobs in the labor market. There was additionally, substantial medical evidence in the record that indicated Complainant was suffering from insomnia as well. The Administrative Law Judge determined that the Complainant was a qualified person with a disability therefore, as she could perform the duties of loader/unloader with Respondent and had requested that accommodation from her employer. The Administrative Law Judge found that because the Legislature had promulgated new Legislative Rules in 1994 which specifically required that employers make accommodations in the scheduling of work and reassignments to vacant positions which the person is able and competent to perform, the Respondent was liable to Complainant for their failure to accommodate her by assigning her to the two part time shifts as a loader/unloader in the warehouse, which the medical evidence indicated she was capable of performing. The Complainant was able to successfully work for BASF as a Chemical Operator A and B, which work did not involve driving or interacting with the public, and was a structured environment.

The Administrative Law Judge awarded the Complainant back pay net of mitigation in the total amount of \$115,549.23 for lost wages and benefits from May 5, 1995 forward to August 2001; \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity and reasonable attorney's fees and costs in the amount of \$75,288.14. Subsequently, the West Virginia Human Rights Commission voted to deny liability on the part of the Respondent employer based upon the language in the West Virginia Supreme Court case of Skaggs v. Elk Run Coal Co., Inc., 479 S.E.2d 561 (W.Va. 1996), which stated that its holding that the West Virginia Human Rights Act did require reassignment to other vacant positions was prospective in application only. The West Virginia 3-2 vote, in its January 2004 Term decision No. 31645, July 2, 2004, holding that the Commission had failed to apply the Legislative Rules in effect at the time of the incident of discrimination which required reassignment to vacant positions as reasonable accommodation. On September 3, 2004, the West Virginia Human Rights Commission affirmed the Administrative Law Judge's Supplemental Final Decision on Damages and Attorney's Fees and awarded the Complainant Damages and Attorney's Fees up to and including the Appeal to the West Virginia Supreme Court for the total amount of \$230,226.48 in lost wages and benefits plus interest, \$3,277.45 for humiliation, embarrassment, emotional distress and lost of personal dignity and \$98,355.64 in attorney fees and costs.







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