



WEST VIRGINIA HUMAN RIGHTS COMMISSION

INVESTIGATORY PROCESS AND PROCEDURE

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The West Virginia Human Rights Commission [hereinafter “Commission” or “HRC”] is the state agency created by the West Virginia Human Rights Act and charged with the responsibility of working to eliminate discrimination in West Virginia. As part of this mandate, the Commission accepts, docket, investigates and adjudicates claims of employment and public accommodation discrimination.¹ Violations of the Act may also be pursued by individuals without the assistance of the Commission, as the HRA also establishes a private cause of action in circuit court for violations of the Act.²

Practice and procedure before the Commission is governed by the West Virginia Human Rights Act and the regulations promulgated thereunder.³ The *Rules of Practice and Procedure Before the West Virginia Human Rights Commission* [hereinafter “Procedural Rules”] are a valuable resource for practitioners who work with parties during Commission investigations and appear before Commission ALJs.⁴

¹Pursuant to the West Virginia Fair Housing Act, the Commission also investigates claims of housing discrimination. W. Va. Code §§ 5-11A-1 to 5-11A-20.

²W. Va. Code § 5-11-13.

³W. Va. Code §§ 5-11-8 and 5-11-10. In addition to the Commission’s Procedural Rules, legislative regulations exist with regard to the following subjects: *Discrimination Against Individuals with Disabilities*, W. Va. Code R. §§ 77-1-1 to 77-1-7 (1994); *Religious Discrimination*, W. Va. Code R. §§ 77-3-1 to 77-3-8 (1992); *Sexual Harassment*, W. Va. Code R. §§ 77-4-1 to 77-4-4 (1992); *Exemption of Private Clubs*, W. Va. Code R. §§ 77-5-1 to 77-5-5 (1992); *Waiver of Rights*, W. Va. Code R. §§ 77-6-1 to 77-6-8 (2002); and the *Definition of Employer*, W. Va. Code R. §§ 77-7-1 and 77-7-2 (2002).

⁴The Commission’s web page provides a link to a PDF file version of the Procedural Rules as well as links to the Commission’s legislative regulations. To locate the regulations, follow the link for “download center for forms” located on the Commission’s home page. See <http://www.wvf.state.wv.us/wvhrc/index.htm>.

In addition, the Commission’s web page provides links to current Commission forms, meeting agendas and annual reports. The Commission is currently working on making its final decisions and orders available on-line. By the end of November 2006, the Commission hopes to have the last ten years of decisions available on its web page. The documents will be available in a PDF format. The goal is to eventually publish all of the Commission’s final decisions and final orders electronically.

Complaint Process

The Commission only has jurisdiction over West Virginia Human Rights Act complaints which are filed within 365 days of the date upon which the complainant alleges discrimination occurred.⁵ If the complaint involves a continuing violation, the complaint must be filed within 365 days of the last date upon which discrimination is alleged.⁶

If the complainant chooses, he or she (or counsel) may submit a drafted complaint. The HRC typically will retype these complaints on its complaint template for uniformity and return it to the individual or identified counsel for execution by the complainant. The Human Rights Act and the Commission's Procedural Rules require all complaints to contain the following information to the best of the complainant's knowledge: (1) the name and address of the complainant; (2) the name and address of the respondent; (3) a concise statement setting forth the facts deemed to constitute the alleged discrimination; (4) the date or dates of the alleged unlawful discriminatory practice, or if the alleged unlawful discriminatory practice is of a continuous nature, the date on which the unlawful practice began and the last day on which it occurred; and (5) the verified signature of the complainant.⁷

Consider the complaint as a roadmap for the investigation. If new or additional violations are discovered after the initial complaint is issued, please contact the Commission and request amendments or an additional complaint. Keep in mind that additional violations may only be amended into a complaint if the claim is timely as of the date of the amendment.⁸ Otherwise, the complaint may only be amended to correct technical defects or to amplify or clarify the allegations of the complaint.⁹ If the complaint

⁵W. Va. Code § 5-11-10; Procedural Rule 3.9.4.

⁶Procedural Rule 3.9.4.b; West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 383 S.E.2d 490 (1989).

⁷W. Va. Code § 5-11-10; Procedural Rule 3.8.

⁸Procedural Rule 3.10.

⁹Procedural Rule 3.10.a.

is before an ALJ, amendments may only be made at the discretion of the ALJ for good cause shown.¹⁰

Many people who believe that they have been the victims of unlawful discrimination do not have lawyers. The Commission provides assistance to such individuals in the drafting of complaints.¹¹ The HRC's investigatory process is triggered by the receipt of an Employment Information Background Form. This document must be completed and submitted to the Commission to initiate the process. The Commission uses the EIBF to guide the development of a complaint, if no complaint is provided. It is also used by the investigators in the investigatory process as a source of narrative information from the complainant. Copies of Employment Information Background Forms are available on-line at the Commission's web page. However, these documents must be submitted in hard-copy format.

Investigation

The investigatory process begins with service of the complaint upon the responding party.¹² The *Rules of Practice and Procedure Before the West Virginia Human Rights Commission* provide respondents with a ten day reply period.¹³ The response, or position statement, is most helpful to the investigatory process when it contains a statement of facts and an explanation of the circumstances surrounding the allegations of the complaint. Respondents may also decide to include documents or other evidence that is related to the complaint and that the respondent would like the Commission to consider during the course of its investigation. The response, or position statement, is the respondent's first opportunity to assert its position to the investigators.

Complainants and respondents have a duty to preserve records once the complaint has been served:

¹⁰Procedural Rule 3.10.b.

¹¹Procedural Rule 3.6.

¹²Procedural Rule 3.11.

¹³Procedural Rule 4.2.

When a complaint has been served on an employer, labor organization or employment agency, the Respondent shall preserve all personnel records relevant to the investigation until such complaint is finally adjudicated and the respondent shall be so advised in the notice mentioned in Rule 3.11. The term "relevant to the investigation" shall include, but not be limited to, personnel, employment or membership records relating to the complainant and to all other employees, applicants or members holding or seeking positions similar to that held or sought by the complainant, and application forms or test papers completed by any unsuccessful applicant and by all other applicants or candidates for the same position or membership as that for which the complainant applied and was not accepted and any records which are relevant to the scope of the investigation as defined in the notice or complaint.¹⁴

and

Any other books, papers, documents, or records of any form which are relevant to the scope of any investigation as defined in the notice or complaint shall be preserved during the pendency of any proceedings by all parties to the proceedings unless the Commission specifically orders otherwise.¹⁵

The Commission's investigatory process typically proceeds by asking the complainant to provide a rebuttal to the position statement. The rebuttal is the complainant's opportunity to provide input into the shape of the investigation. A well-crafted position statement can give the Commission information that can trigger additional investigatory steps. To the extent it is known to the complainant, comparator information tends to be very helpful to investigators.

There are a variety of ways the Commission can obtain additional information in an investigation. The HRC may conduct interviews of witnesses or take depositions of such persons,¹⁶ issue interrogatories or questionnaires,¹⁷ and request the production of documents.¹⁸

¹⁴Procedural Rule 3.14.a.

¹⁵Procedural Rule 3.14.c.

¹⁶Procedural Rule 4.3.

¹⁷Procedural Rule 4.5.

¹⁸Procedural Rule 4.4.

While voluntary compliance is preferred, uncooperative parties may be compelled to provide requested information and documents through the issuance of subpoenas and/or subpoenas duces tecum.¹⁹ In rare cases, the Commission may rest a determination on adverse inferences against a party that refuses to respond to the Commission's inquiries and/or fails to provide requested information. If the Commission believes that adverse inferences are required, the party affected by this decision must be notified in writing prior to the imposition of such inferences.²⁰

The HRC takes its responsibility to conduct prompt investigations seriously. On average, a complaint proceeds from docketing to determination in less than 180 days.

Determination

The conclusion of the investigation is published to the parties through the issuance of a Letter of Determination [hereinafter "LOD"]. The LOD identifies whether the evidence obtained throughout the course of the Commission's investigation supports a determination of probable cause or no probable cause.

If the Commission finds no probable cause, an "NPC" LOD is issued to the parties along with an explanation of the complainant's right to request an administrative review of the determination.²¹ Such requests must be made in writing and should be submitted to the executive director or compliance director of the Commission.²² Administrative reviews are granted at the discretion of the executive director, and are currently conducted by the Civil Rights Division.²³ Upon review of the information submitted, the investigatory file and the attorney's recommendation, the executive director issues a decision, and may send the

¹⁹W. Va. Code § 5-11-8(d)(1); Procedural Rule 4.7.

²⁰Procedural Rule 4.6.

²¹Procedural Rule 4.10. Complainants may also request a substantial weight review by EEOC. If successful, this process could result in the issuance of a notice of right to sue in federal court.

²²Procedural Rule 4.14.a.

²³Procedural Rule 4.14.f.

case back for further investigation, uphold the NPC or reverse the NPC determination and enter a probable cause determination.²⁴

A final determination of no probable cause results in the dismissal of a Human Rights Commission case, without prejudice to the claim. The dismissal is accompanied by a notice of right to sue in circuit court.²⁵ While an upheld or uncontested no probable cause determination concludes the Commission's proceedings with regard to a complaint, such a dismissal is not *res judicata* on the claim, since adjudication of the claim has not occurred. The same claim may be filed in circuit court.²⁶

Conciliation

Like many dispute resolution systems, the Commission encourages voluntary settlement in all phases of the investigation and adjudication.²⁷ Conciliation is provided for in W. Va. Code §§ 5-11-8 and 5-11-10. The Human Rights Commission currently engages in predetermination conciliation [hereinafter "PDC"], and invites the parties to participate in conciliation in advance of the Commission issuing a determination upon the complaint. Early in the investigative process, the parties are provided information about conciliation and are invited to let the Commission know if they are interested in the process. Conciliation can allow for early settlements when both parties are interested in resolution. It can also be attractive to respondents, inasmuch as the PDC process can occur prior to any formal determination being published. The HRA requires that conciliation agreements remain confidential, at least as to the identities of the parties.²⁸

²⁴Procedural Rules 4.14.f.1 - 4.14.f.5.

²⁵Procedural Rule 4.14.f.6. An HRA claim may be filed in circuit court without an HRC dismissal. A complainant may request a right to sue letter at any time. Additionally, the HRA provides for a private cause of action in circuit court. W. Va. Code § 5-11-13.

²⁶Jones v. Glenville State College, 189 W. Va. 546, 433 S.E.2d 49 (1993).

²⁷Procedural Rule 4.13.

²⁸W. Va. Code § 5-11-10; Procedural Rule 4.13.

Adjudication of Probable Cause Complaints

Unresolved probable cause cases are referred to the Commission's ALJ division so that a public hearing may be set.²⁹ The case is assigned to an administrative law judge, and a scheduling order is issued.³⁰ The respondent has ten days after receipt of the public hearing notice to file a verified answer.³¹ This answer is required in addition to any previously filed investigatory answer or position statement.

Complainants who are not represented by private lawyers work with the Civil Rights Division of the Office of the Attorney General on the development and litigation of their cases. If the complainant is represented by private counsel and the Commission has no independent interest in the matter, the case in support of the complaint is typically presented solely by the complainant's attorney.³² A respondent may appear with or without counsel.³³ Procedural Rule 7.9. provides that attorneys shall file a notice of appearance with the administrative law judge, and having done so shall remain that party's attorney until withdrawing or revoking the representation.³⁴

Discovery in cases before the Commission is governed by the agency's Procedural Rules. The Rules allow for written discovery in the form of interrogatories and requests for

²⁹A complainant who receives a probable cause finding at the Commission may continue to a public hearing before one of the Commission's ALJs, or may withdraw his or her claim and file suit in circuit court. The HRA does not have an exhaustion of administrative remedies requirement, but it does provide for the issuance of a "right to sue letter." W. Va. Code § 5-11-13. At any time during the pendency of a Human Rights Commission claim, a complainant may request a right to sue letter. A right to sue letter is automatically issued at any time the Commission dismisses a claim without adjudication, such as for lack of jurisdiction or with a finding of no probable cause. The right to sue letter has the effect of reopening the statute of limitations, if it has already expired, for a 90 day window in which the Complainant may file the claim in circuit court.

³⁰Procedural Rule 4.12.

³¹Procedural Rule 6.1.

³²Procedural Rule 7.7. Unrepresented complainants are represented by Commission's counsel.

³³Procedural Rule 7.6.

³⁴An answer prepared and provided by an attorney on behalf of a Respondent serves as a notice of appearance. Procedural Rule 7.9.

production of documents. Requests for admissions are not provided for in the Commission's Procedural Rules. Unlike the Rules of Civil Procedure, the Commission's Procedural Rules only provide a period of twenty days for answering written discovery.³⁵

Depositions may be taken at the discretion of the ALJ upon motion by a party.³⁶ Often, parties are able to stipulate to depositions, but it is preferred by the ALJs that any such agreement be formalized with the submission of an agreed order.

Motions, other than those motions made during the course of a hearing, must be made in writing.³⁷ Unlike circuit court, any response to a motion must be submitted within five days, regardless of whether a hearing has been set on the motion. The ALJ may use discretion in scheduling arguments upon a motion or making a ruling based upon the written submissions alone.³⁸

Public Hearings

Hearings are conducted on the record before a Commission ALJ. Testimony is sworn and may be obtained by subpoena.³⁹ The Rules of Evidence apply.⁴⁰ HRC hearings are conducted in the county where the respondent resides or conducts business at a place designated by the ALJ.⁴¹ Hearings are open to the public except in extraordinary circumstances.⁴² They may be recorded by the media only with the permission of the ALJ.⁴³

³⁵Procedural Rules 7.25.a. and 7.26.b.

³⁶Procedural Rule 7.16.a.

³⁷Procedural Rule 7.11.

³⁸Procedural Rule 7.11.

³⁹Procedural Rule 7.4.

⁴⁰Procedural Rule 7.30.

⁴¹Procedural Rule 7.2. The parties may stipulate to another location for the hearing.

⁴²Procedural Rule 7.1.

⁴³Procedural Rule 7.34.

The administrative law judge may permit oral arguments or written arguments. Generally, the administrative law judge will require the parties to submit proposed findings of fact and conclusions of law subsequent to the public hearing.⁴⁴ The rules require that the administrative law judge shall issue a final decision on the merits of the case, containing findings of fact and conclusions of law necessary to support the decision.⁴⁵

Once a hearing is scheduled, agreed-to resolutions short of adjudication remain favored. Mediation may be ordered by the administrative law judge or may be agreed to by the parties. The Commission's mediation rules, Procedural Rule 4.15. *et seq.*, closely track the rules for mediation in circuit court. Mediations are confidential.⁴⁶

Remedies

The HRA provides for substantial consequences for violations of the Act.⁴⁷ In the administrative context, complainants may be awarded such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination."⁴⁸ Compensatory and equitable relief

⁴⁴Procedural Rule 7.37.

⁴⁵Procedural Rule 9.1. This rule establishes a one-year time line from the date of docketing for the issuance of a final decision.

⁴⁶Procedural Rule 4.15.I.

⁴⁷ "[I]t is readily discernible that the Legislature, by its recent enactments in the field of human rights, intended to and did provide the Commission the means with which to effectively enforce the law and meaningfully implement the legislative declaration of policy. If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement.

Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 149, 324 S.E.2d 99, 109 (1984) (*quoting West Virginia Human Rights Commission v. Pauley*, 158 W. Va. 495, 499-500, 212 S.E.2d 77, 79 (1975), *overruled on other grounds, West Virginia Human Rights Commission v. Pearlman Realty Agency*, 161 W. Va. 1, 5, 239 S.E.2d 145, 147 (1977)).

⁴⁸Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

should be granted to the fullest extent possible because of the remedial nature of the HRA.⁴⁹ Such relief includes back pay,⁵⁰ reinstatement and front pay.⁵¹

Cases before the Commission involve both individual harm and the public interest. In addition to damages that compensate for lost employment, complainants are also entitled to other relief, including cease and desist orders and other equitable relief. The HRA provides for the issuance of cease and desist orders.⁵² In addition to the make whole remedy available to a complainant, cease and desist orders may contain provisions which will aid in eliminating future discrimination.⁵³

The HRC may also award incidental damages “as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, without proof

⁴⁹West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 536, 383 S.E.2d 490, 501 (1989).

⁵⁰W. Va. Code § 5-11-10; Procedural Rule 9.3.a.; Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). With respect to back pay, plaintiffs may be awarded interest. Interest is payable on back pay awards at a rate of ten percent per annum. W. Va. Code § 56-6-31; Rodriguez v. Consolidation Coal Co., 206 W. Va. 317, 524 S.E.2d 672 (1999); Hensley v. West Virginia Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985).

⁵¹W. Va. Code § 5-11-10; Mayflower Vehicle Systems, Inc. v. Cheeks, 218 W. Va. 703, 629 S.E.2d 762 (2006); Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 318, 418 S.E.2d 764 (1992); Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992); Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305, 311 (1989).

⁵²W. Va. Code § 5-11-8(d)(6). If the ALJ determines that discrimination has occurred he or she “shall issue an order requiring such respondent to cease and desist from such unlawful discriminatory practice[.]” Procedural Rule 9.2.

⁵³In cases adjudicated before Human Rights Commission ALJs, such equitable relief has included cease and desist orders, requirements to provide anti-discrimination training to managers and employees, and monitoring of employment practices. A cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the respondent that the tribunal's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger v. Shepherdstown Volunteer Fire Dep't, Docket No. PAS-48-77; see also Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983).

of monetary loss.”⁵⁴ Incidental damages may be awarded in an amount consistent with the standard articulated in Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Multiple respondents cannot be each held liable for a separate incidental damages award unless they are independently liable to the complainant.⁵⁵

The complainant may be awarded reasonable attorney’s fees and costs.⁵⁶

Appeals

Aggrieved parties may file petitions for administrative appeal with the Commission within thirty days of receipt of the ALJ’s decision. The Commission’s standard of review is similar to that applied to appellate courts.⁵⁷ The Commission has sixty days after the notice of appeal is filed to issue a final order.⁵⁸ Judicial appeal of HRC final orders is governed by W. Va. Code § 5-11-11. Any party aggrieved by a final order of the Human Rights Commission may appeal the decision to the Supreme Court, provided it is filed within thirty days of receipt of the final order.⁵⁹ Any final order of the West Virginia Human Rights Commission in which the complainant is awarded back pay in excess of \$30,000 or other damages in excess of \$5,000 may be appealed into circuit court.⁶⁰

Enforcement

Commission final orders and conciliation agreements may be enforced in circuit court.⁶¹

⁵⁴Frye v. Future Inns of America-Huntington, Syl. pt. 1, 211 W. Va. 350, 566 S.E.2d 237 (2002); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989); Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977).

⁵⁵Frye v. Future Inns of America, 211 W. Va. 350, 566 S.E.2d 237 (2002).

⁵⁶Procedural Rule 9.3.c.

⁵⁷See W. Va. Code § 5-11-8(d)(3); Procedural Rule 10.

⁵⁸Procedural Rule 10.6.

⁵⁹W. Va. Code § 5-11-11(a); Procedural Rule 11.2.

⁶⁰W. Va. Code §§ 5-11-11(b) and 29A-5-4.

⁶¹W. Va. Code § 5-11-11(b).

The West Virginia Human Rights Commission has tools available for practitioners on its web page.⁶² In addition to the Employment Information Background Form, the Commission's web page provides links to current Commission meeting agendas, annual reports of the agency, as well as links to the West Virginia Human Rights Act and related regulations.

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⁶² <http://www.wvf.state.wv.us/wvhrc/>