



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

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Herman H. Jones  
Executive Director

September 18, 1998

**CERTIFIED MAIL/RETURN  
RECEIPT REQUESTED**

James C. Brown, II  
1 Meg Drive, Apt. 2A  
Sissonville, WV 25320

WV Division of Natural Resources  
Building 3, Room W-669  
State Capitol Complex  
Charleston, WV 25305

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Asst. Attorney General  
Civil Rights Division  
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Charleston, WV 25326-1789

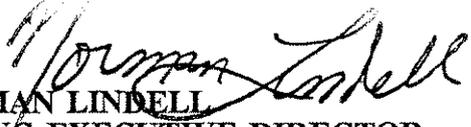
Daynus Jividen, Esq.  
Sr. Asst. Attorney General  
Building 3, Room W-669  
State Capitol Complex  
Charleston, WV 25305-0660

Re: James C. Brown, II v. West Virginia  
Department of Natural Resources  
Docket No. PAH-22-97

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

  
NORMAN LINDELL  
ACTING EXECUTIVE DIRECTOR

NL/jk

Enclosures

Certified Mail/Return  
Receipt Requested

cc: The Honorable Ken Hechler  
Secretary of State

Mary Catherine Buchmelter  
Deputy Attorney General  
Civil Rights Division

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**JAMES CARL BROWN, II,**

**Complainant,**

**v.**

**DOCKET NO. PAH-22-97**

**WEST VIRGINIA DEPARTMENT  
OF NATURAL RESOURCES,**

**Respondent.**

**FINAL ORDER**

On September 10, 1998, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

The Administrative Law Judge's award of incidental damages in the amount of \$2,000, which the ALJ ruled was to be suspended if the Respondent issued the Class Q permit which is the subject of this action to the Complainant within fifteen days of receipt of the Final Decision, is affirmed.

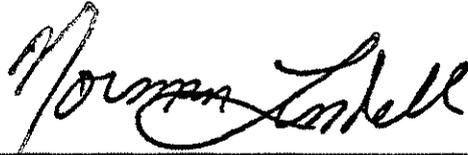
It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto as Exhibit A.

**It is so ORDERED.**

**WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**Entered for and at the direction of the West Virginia Human Rights Commission  
this 18th day of September, 1998, in Charleston, Kanawha County, West Virginia.**

A handwritten signature in cursive script, reading "Norman Lindell". The signature is written in black ink and is positioned above a horizontal line.

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**NORMAN LINDELL, ACTING EXECUTIVE DIRECTOR  
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

## **NOTICE OF RIGHT TO APPEAL**

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

**EXHIBIT A**

**BEFORE THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**JAMES CARL BROWN, II,**

**Complainant,**

v.

**Docket No. PAH-22-97**

**DEPARTMENT OF NATURAL RESOURCES,**

**Respondent.**

**FINAL DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

This matter came on for hearing on 17 June 1997 at the Offices of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant, James Carl Brown, II, was present in person. The case was presented on his behalf by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General John McFerrin. The respondent was represented by its agent, Lt. Col. William B. Daniel, Deputy Chief of Law Enforcement, and its counsel, Senior Assistant Attorney General Daynus Jividen.

**I. ISSUE TO BE DECIDED**

Whether respondent, a place of public accommodation, unlawfully discriminated against complainant because of his disability, in violation of W.Va. Code §5-11-9(6) and the regulations

promulgated pursuant thereto, by refusing the reasonable accommodation of issuance of a Class Q hunting and fishing license.

## II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true<sup>1</sup>:

### A. Preliminary Facts

1. James Carl Brown, II is a citizen and resident of Kanawha County, West Virginia. He was 42 years of age at the time of the hearing. Mr. Brown has a variety of physical conditions which,

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<sup>1</sup> To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

as a whole, render him a person with a handicap or disability within the meaning of W.Va. Code §5-11-3(m).

2. Mr. Brown's relevant physical conditions include:

(a) Partial paraplegia which results in some loss of control over the muscles in both lower extremities;

(b) Complications from childhood polio which prevent full use of his arms;

(c) Diabetic neuropathy which decreases his ability to sense touch and pain in his legs and feet; and

(d) Diabetes.

3. Mr. Brown's physical conditions, particularly as they effect both legs, are "permanent", meaning that they are not expected to improve or recover over time.

4. Respondent is an agency of the State of West Virginia and is charged with issuing hunting and fishing licenses to qualified individuals, including Class Q licenses which are reserved for persons who are disabled in the lower extremities. Respondent is a place of public accommodation as that term is defined by W.Va. Code §5-11-3(j).

**B. Mr. Brown Applies for a Class Q License**

5. In April 1996 complainant applied in writing for a Class Q license from respondent. (Resp. Ex. 1). Though his application states that he was applying for a Class Q fishing license only, Mr. Brown testified that he actually wanted to apply for a joint license and that he intended to mark the box labelled "Disabled-Lower Extremities Hunt/Fish".

6. A holder of a Class Q license does not have to pay the \$11.00 fee usually assessed for issuance of a hunting or fishing permit. A Class Q license also exempts the holder from the statutory prohibition against possessing a loaded weapon in a vehicle and discharging a weapon from a vehicle. See, W.Va. Code §20-2-5(4) and (10) and §20-2-46e. Finally, a Class Q license holder can fish at six sites in the State which are seasonally restricted to Class Q permits only. Out of 350,000 hunting and fishing licenses issued annually in West Virginia, only 2023, or less than 1%, are Class Q licenses.

7. Though Mr. Brown has never actually and officially applied for a Class Q hunting license, it is clear from respondent's position, explained infra, that if he had his application would have been rejected. Given his intent to apply for both licenses, and the undisputed result if he had correctly carried out his intention, I will assume for purposes of this litigation only that Mr. Brown did, in fact, apply for both hunting and fishing Class Q permits.

8. Mr. Brown has a permit to carry a concealed weapon and has taken a gun safety educational course. Though he has never been hunting, he is interested in attempting it. He does not have a fishing license, but expressed a similar interest in that sport.

9. Mr. Brown testified credibly that he applied for a Class Q permit because his physical conditions prevent him from engaging in hunting or fishing without the accommodations afforded by that class of license. He stated that due to a very unsteady gait attributable to the disabilities in his lower extremities, he cannot walk any meaningful distance without the aid of a crutch. Even with the aid of a crutch, he cannot ambulate for more than a "city block". When travelling farther distances, he uses a wheelchair. He also relies on a wheelchair for mobility when he is at home and for such activities as shopping at a mall or attending a concert or sporting event. He is licensed to drive a motor vehicle and his vehicle is equipped with hand controls.

10. Mr. Brown stated that due to his disability he does not believe that he can safely load and fire a weapon while standing up. Though he could use his weapon when in a prone position, he would have great difficulty resuming a standing position. He testified that hunting from his vehicle (as allowed Class Q license holders) would allow him to discharge his weapon with accuracy, without endangering himself or others, and would give him access to the often difficult terrain of many public hunting areas.

11. As required by respondent, Mr. Brown's application for a Class Q license was accompanied by a verification from his treating physician, Dr. Michael D. Hall, who checked a box

indicating that Mr. Brown is "Required to use a wheelchair or crutches PERMANENTLY due to a disability affecting BOTH legs." (Resp. Ex. 2, emphasis in original). Dr. Hall described Mr. Brown's disability as "partial paraplegia."

### C. Respondent Investigates and Rejects the Application

12. Upon receipt of Mr. Brown's application for a Class Q permit, respondent assigned DNR Conservation Officer Clifford M. McDowelle to investigate. Officer McDowelle testified that when he went to meet complainant at his home, Mr. Brown met him in the parking lot and they both walked 20 to 30 yards to complainant's apartment. He said that Mr. Brown was using a cane, not a crutch. After they entered the apartment Mr. Brown sat in his wheelchair. According to the officer, Mr. Brown admitted to having orthopedic shoes that permitted him to walk short distances.

13. After visiting with Mr. Brown for 10 to 15 minutes, Officer McDowelle recommended that complainant's application for a Class Q permit be denied on the ground that Mr. Brown does not always have to use a wheelchair or crutches, as evidenced by his use of a cane to greet the officer in the parking lot. (See, Resp. Ex. 3). Mr. Brown, however, denied that he was using a cane on the day that he met Officer McDowelle and insisted that he was relying on a crutch.

14. DNR Lt. Tom Wasmer also participated in the investigation of complainant's application. He was out of uniform and "undercover" when he saw complainant enter and leave a

restaurant on two occasions. On both occasions Mr. Brown did not use a wheelchair, but did use one crutch. Lt. Wasmer observed that Mr. Brown has an abnormal gait, though he concluded that Mr. Brown was not dependent upon the crutch for mobility. On another occasion Lt. Wasmer clandestinely videotaped Mr. Brown at a roadside picnic table to show that he was not always in a wheelchair or using two crutches. Lt. Wasmer also recommended that the application be denied since, in his opinion, ". . . if a man can walk any distance at all, he can hunt and fish. He [can] get to a stand. He can get to a stream. He can get to a pond. As officers, that's how we see it."

15. Col. William B. Daniel is respondent's Deputy Chief of Law Enforcement. He made the ultimate decision to deny Mr. Brown's Class Q permit application after reviewing the negative recommendations of Officer McDowelle and Lt. Wasmer. While recognizing that Mr. Brown is permanently disabled and that his condition is not going to improve, Col. Daniel believes that rejection of the application was appropriate since complainant "does not permanently use a wheelchair or crutches. And he can ambulate without the use of those items." (See, Resp. Ex. 4, the official notice of rejection).

16. Col. Daniel testified that even without a Class Q permit, there are numerous hunting and fishing sites throughout West Virginia that are accessible and suitable for persons such as Mr. Brown who have an awkward gait and difficulty walking. The main impact of the Class Q denial, according to Col. Daniel, is that Mr. Brown will not be able to load and discharge a weapon while in his vehicle. Such a practice, Col. Daniel alleged, is an inherent safety risk and respondent tries to limit its use to persons who truly cannot otherwise hunt.

17. Col. Daniel conceded that among Class Q license holders may be double amputees who are able to ambulate without great difficulty by use of modern prosthetic devices. Such persons are entitled to Class Q license by virtue of having lost both legs despite having greater ambulatory mobility than Mr. Brown.

**D. Testimony of Dr. Hall**

18. Dr. Michael D. Hall was the only medical witness to testify at hearing. He has been Mr. Brown's treating physician since 1992. He testified that Mr. Brown has difficulty walking which is related to diagnoses of partial paraplegia and diabetic neuropathy. He also has partial loss of the ability to control the muscles in both lower extremities due to polio. The lack of strength or control of his muscles in the lower extremities has the affect of giving him an awkward or shuffling gait. Additionally, the diabetic neuropathy decreases his ability to sense touch and pain in his lower extremities, particularly his feet. His conditions effect both legs and they are permanent. Both the polio and the diabetes affect his ability to stand. With decreased sensation in his feet, he is never really sure of his footing. His awkward gait makes it very difficult for him to carry things while he is walking.

19. In regard to the issues at hand, it was Dr. Hall's opinion that Mr. Brown was probably physically able to stand to load and fire a weapon, but could probably not do so without jeopardizing the safety of himself or those around him: ". . . the more unstable you are, the more you cannot be certain that you're standing in a firm position, the greater the chance you can fall and lose your

balance, drop the firearm. And the consequences of that could be obvious." He also testified that Mr. Brown fatigues rapidly when required to walk.

20. In regard to fishing, Dr. Hall testified that Mr. Brown needs safe access to the water. Once he gains access to the water, he can safely fish from his wheelchair or vehicle.

### III. CONCLUSIONS OF LAW

1. Complainant is a person with a handicap or a disability within in the meaning of the West Virginia Human Rights Act, W.Va. Code §5-11-3(m), and the West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities, 6 W.Va. C.S.R. §77-1-2.1 (1994).

2. Respondent, West Virginia Department of Natural Resources, is a person and place of public accommodation as those terms are defined by W.Va. Code §§5-11-3(a) and 5-11-3(j), respectively.

3. W.Va. Code §5-11-9(6) provides that it is an unlawful discriminatory practice:

(6) 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[.] . . .

4. When a disabled person seeks the benefits of a place of public accommodation, HRC regulations outline the duties placed on respondent:

It shall be unlawful to refuse to make reasonable accommodations necessary to make any public accommodation accessible to and functional for individuals with disabilities. In determining whether an accommodation is reasonable, the Commission shall consider:

7.7.1. The nature and size of the public accommodation.

7.7.2. The nature and cost of the accommodation needed;

7.7.3. Whether or not the public accommodation is owned, operated, funded, or used, by an agency of government; . . .

6 W.Va. C.S.R. §77-1-7.7.

5. As is clear from the regulation cited, a respondent's duty to reasonably accommodate the disabled applies to "any public accommodations" under its control. (Emphasis added). The fact that a respondent may have other public accommodations that are accessible and functional to the disabled does not extinguish or lessen its duty to reasonably accommodate the disabled at the particular facility he or she wishes to use. Thus, it is not a reasonable accommodation when a disabled person is unreasonably denied use of a particular facility, but told that he or she may use a different facility some distance away. The duty to reasonably accommodate applies to each facility

and the disabled may not be segregated, albeit unintentionally, to a fewer number of opportunities if a reasonable accommodation would allow access to a greater or equal number.

6. The Class Q hunting permit is provided for in W. Va. Code §20-5-46e:

On and after the first of January, one thousand nine hundred eighty-two, a Class Q permit shall be a special statewide hunting permit and shall entitle the permittee to hunt all legal species of game during the designated hunting seasons.

A form for such permit shall be furnished by the director to any applicant who meets the following requirements:

- (1) He is a resident of this State;
- (2) He is permanently disabled in the lower extremities; and
- (3) He holds a Class A or AB resident statewide hunting license or a senior citizens license.

The form when properly filled out by a licensed physician shall attest to the disability of the applicant and shall, from the date of signing by the physician, constitute a Class Q permit which the permittee shall have in his possession when hunting during any hunting season for which permittee holds a valid license as provided herein. The director shall establish such rules and regulations as he deems necessary to administer the qualifications and permitting of applicants.

A Class Q permit shall entitle the holder thereof to hunt from a motor vehicle and, notwithstanding the provisions of subsection (10), section five of this article, to possess a loaded firearm in a motor vehicle, but only under the following circumstances:

- (a) The motor vehicle is stationary;
- (b) The engine of the motor vehicle is not operating;
- (c) The permittee is the only occupant of the vehicle;

(d) The vehicle is not parked on the right-of-way of any public road or highway; and

(e) The permittee observes all other pertinent laws and regulations.

W.Va. Code §20-2-46e (1980).

7. By regulation, respondent defines the term crucial to the resolution of this litigation:

"An individual disabled in the lower extremities" means an individual who is paraplegic, who is missing both legs, or who has a disability affecting both legs which requires permanent use of a wheelchair or crutches.

C.S.R. Title 47, Series 11A, §2.10.

8. A reasonable accommodation that would allow complainant equal opportunity to hunt and fish is for respondent to issue him a Class Q license as provided by law.

9. The sole reason<sup>2</sup> that respondent refuses to issue a Class Q license to Mr. Brown is that it claims to interpret the terms "permanently" and "permanent" to mean that an applicant must use crutches or a wheelchair at all times and cannot ambulate at all by any other means.

10. Respondent offers no reason that the terms "permanently" or "permanent" cannot be or should not be reasonably construed to mean that an applicant's disability must be permanent, i.e.

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<sup>2</sup> To the extent respondent raises any other reason in its post-hearing submission the same is rejected as not being fairly litigated so as to allow the Commission an opportunity to address that issue at hearing.

not capable of improving or being cured over time as opposed to such temporary disabilities as two severely sprained ankles or two broken legs. Under this interpretation, Mr. Brown would be eligible for a Class Q license since his disability is undoubtedly permanent and requires that he use a wheelchair or a crutch to safely ambulate in nearly every aspect of his life. It is also obvious that Mr. Brown's reliance on a wheelchair or crutch is permanent since his condition is not expected to improve.

11. While an adjudicator must usually give deference to the interpretation of law of the officer charged with statutory implementation, that policy does not extend to ad hoc representations made for purposes of litigation. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988). The interpretation offered by respondent is not so clear from the statute or regulation themselves as to foreclose a conclusion that its position is taken for purposes of this litigation.

12. An adjudicator is under an obligation to resolve conflicts between statutes so as to give both laws effect and to fulfill the purposes of each statute. Myers v. Cline, 180 W.Va. 103, 437 S.E.2d 267 (1993). In doing so, the intention of the legislature is to be determined not from any single part, provision, section, sentence, phrase or word but rather from the general consideration of the statutes in their entirety. Parkins v. Londeree, 124 S.E. 2d 471 (1962).

13. An interpretation that the words "permanently" and "permanent" (as they appear in W.Va. Code §20-5-46e and W.Va. C.S.R. §47-11A-2.10 respectively) describe the extent and nature of the applicant's disability, rather than require absolute exclusive use of a wheelchair or crutches,

preserves and reconciles both the obvious safety concerns of §20-2-46e and the mandate for reasonable accommodation of the disabled established by the West Virginia Human Rights Act. Based on the testimony of Dr. Hall, there is no doubt that safety is better served by allowing Mr. Brown to hunt from his vehicle rather than on foot. Respondent's assertion that such an interpretation would cause a flood of similarly disabled applicants and a resultant increase in the likelihood of firearms accidents is dismissed as being speculative and mere conjecture.

14. Respondent produced no evidence that the size or cost of the accommodation requested would be more than de minimis. The fact that respondent is an agency of government is another factor tipping the balance in favor of the Commission. W.Va. C.S.R. §77-1-7.7.1 to 7.7.3.

15. I conclude as a matter of law that the Commission has shown by a preponderance of the evidence that respondent violated W.Va. Code §5-11-9(6) and its regulations by rejecting the reasonable accommodation requested by complainant (issuance of a Class Q license) that would allow him equal opportunity to hunt and fish in a safe manner.

16. As a result of respondent's violation of law, the following relief is appropriate and is awarded:

(a) Respondent shall issue a Class Q hunting and fishing license to James Carl Brown, II forthwith;

(b) Complainant is awarded incidental damages of \$2,000, provided that the award of the same is suspended and revoked if a Class Q permit is issued to Mr. Brown within fifteen (15) days from respondent's receipt of this decision; and

(c) Respondent is ordered to CEASE AND DESIST from continuing to deny reasonable accommodations to qualified individuals with a disability.

Enter this 16th day of June, 1998.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly  
MIKE KELLY  
Administrative Law Judge  
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Charleston, West Virginia 25321  
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