



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE 304-348-2616

Quewanncoii C. Stephens
Executive Director

March 28, 1990

Sandra L. Calvert
Rt. 1. Box 1521
Kingwood, WV 26537

Innervision Olympic Center
P.O. Box 158
Kingwood, WV 26537

Tom Rodd, Esq.
264 High St.
Morgantown, WV 26505

Jane Charnock, Esq.
523 Peoples Bldg.
Charleston, WV 25321

Re: Calvert v. Innervision Olympic Center
EH-419-87

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the Kanawha County Circuit Court within 30 days of receipt of this final order.

Sincerely,



Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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 Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., 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, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAN 18 1990

SANDRA L. CALVERT,

WV HUMAN RIGHTS COMM.
Answered _____

Complainant,

v.

DOCKET NO. EH-419-87

INNERVISION OLYMPIC CENTER,

Respondent.

ORDER

On January 10, 1990, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the Commission adopted said proposed order and decision, encompassing the findings of fact and conclusions of law therein, as its own, with modifications and amendments set forth below:

In the subsection entitled "Relief" of the original proposed order and decision, the second paragraph on page 10 is modified to read:

Complainant felt destroyed by her discriminatory termination. As Trolland continued to flagrantly violate the principles underlying the Human Rights Act, even after complainant was fired, by making comments rooted in stereotypes to complainant's prospective employers, complainant's Myasthenia gravis flared up. This case is ideal for an award of substantial incidental damages for loss of dignity, humiliation and embarrassment. However, the decision of the West Virginia Supreme Court of Appeals in Bishop Coal Company v. Brenda Salyers and the West Virginia Human Rights Commis-

sion, 380 S.E.2d 238 (1989) authorizes the Commission to award only up to \$2,500.00 in damages (other than lost wages) to victims of discrimination.

Furthermore, in subsection "Proposed Order" of the original order and decision, the following paragraph should be added as paragraph number eight:

That the respondent be ordered to pay complainant the sum of \$2,500.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward her by respondent.

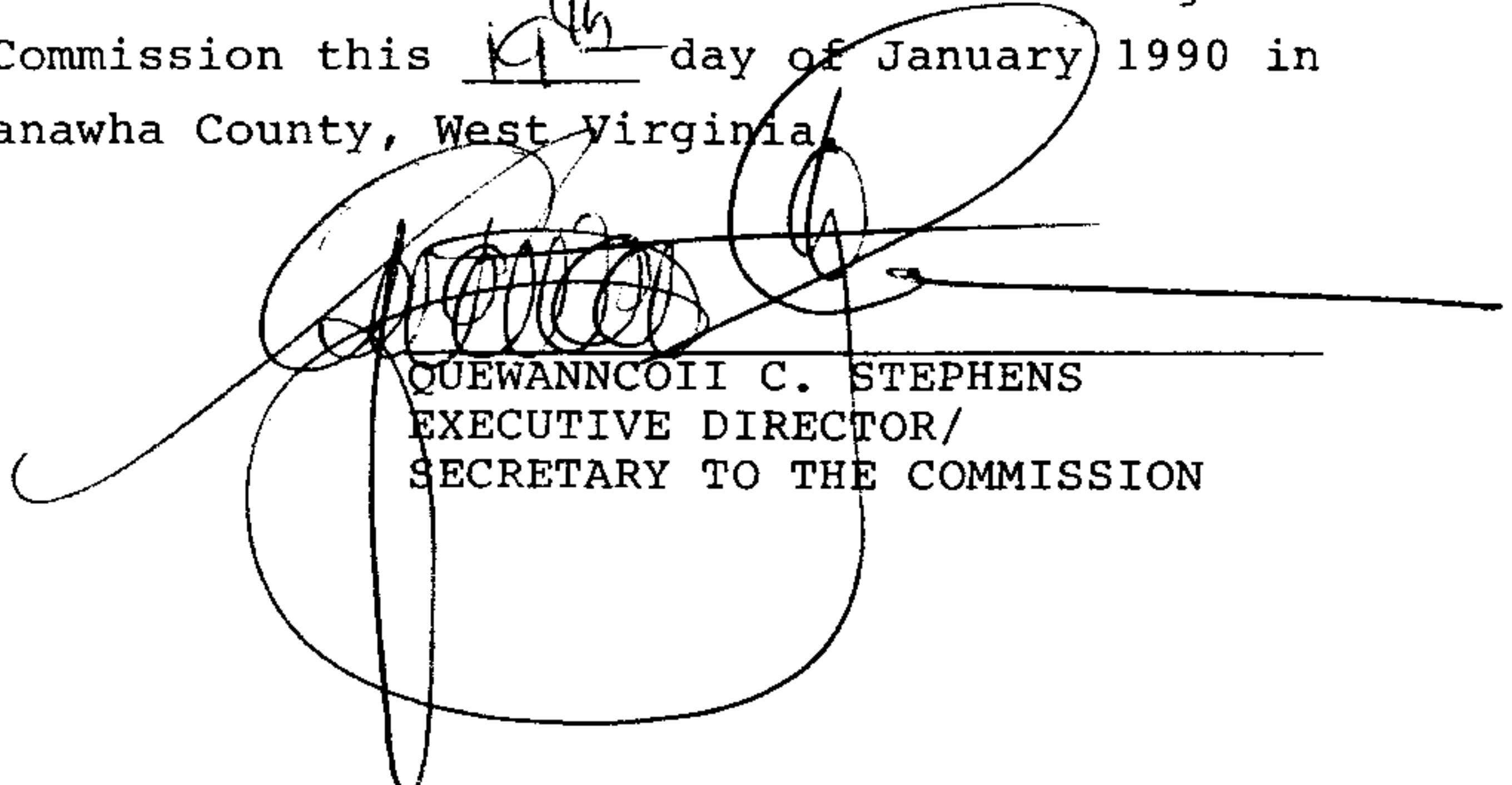
It is therefore, the ORDER of the Commission that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of the final order except as amended by this final order.

By this final order, a copy of which shall be sent certified mail to the parties, the parties are hereby notified that they have ten (10) days to request a reconsideration of this final order and that they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN
RIGHTS COMMISSION

Entered for and at the direction of the West Virginia
Human Rights Commission this 11th day of January 1990 in
Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR/
SECRETARY TO THE COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

JAN 18 1989

W.V. HUMAN RIGHTS COMM.

SANDRA L. CALVERT,

Complainant,

v.

DOCKET NO. EH-419-87

INNERVISION OLYMPIC CENTER,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on October 13, 1988 in Kingwood, West Virginia. Commissioner Russell Van Cleve served as Hearing Commissioner. The complaint was filed on March 12, 1987. The notice of hearing was issued on September 16, 1987. Respondent answered on October 12, 1987. A telephone Status Conference was convened on December 16, 1987. Subsequent to the hearing, both parties filed written briefs and proposed finding of fact. Discovery sanctions had been imposed upon respondent but they were later waived by complainant because complainant's brief and proposed findings of fact were late.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views 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 not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent fired her because of her handicap - Myasthenia gravis. Respondent maintains that complainant was fired for poor performance.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth on the record at the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant was hired by respondent on the 24th day of February, 1986 by Edgerton.
2. Complainant's employment at respondent was terminated on the 17th day of December 1986 by Trolland.
3. Complainant suffers from Myasthenia gravis.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

4. Complainant's Myasthenia gravis was in partial remission while she was employed by respondent. Occasionally she had bad days in which she would experience vision, speech and/or muscular problems, but her condition did not affect her ability to do her job.

5. On December 8, 1986, complainant received a job evaluation from respondent. Of the five categories on said evaluation, complainant received two ratings of outstanding and three ratings of satisfactory.

6. Complainant's work at respondent was never criticised, and she was never counselled or disciplined for poor work performance prior to her termination.

7. Shortly after Trolland became the new Executive Director at respondent, complainant informed him of her handicap, Myasthenia gravis. Within a short time thereafter, Trolland began to require complainant to perform an unreasonably large amount of work.

8. Because of the vast increase in her workload, and the stress caused thereby, complainant's Myasthenia gravis flared up. Complainant's doctor instructed her to slow down. Complainant showed the note to Trolland, who indicated that complainant should not worry about having to slow down.

9. On December 17, 1986, complainant returned from one day of leave, and was fired by Trolland because she was allegedly not getting her work done.

10. At the time of her termination on December 17, 1986,

complainant was earning \$1,200.00 per month.

11. In correspondence with the Veteran's Administration dated October 27, 1986, Peterson, the former Executive Director of respondent stated that her salary would be \$1,800.00 per month as of April 10, 1988.

12. Complainant found another job in March 1987 at a salary of \$13,000.00 per year or \$1,083.33 per month. After 90 days her salary was raised to \$15,000 per year or \$1,250.00 per month. In July, 1988 complainant's salary was raised to \$16,851 per year or \$1,404.25 per month.

13. Complainant's attorney, Rodd, reasonably expended 59.7 hours in the preparation and litigation of this matter.

14. An hourly rate of \$90.00 per hour is reasonable for the legal services rendered by complainant's attorney herein.

15. Complainant expended \$58.37 in costs and expenses reasonably necessary for the litigation of this matter.

16. Complainant felt destroyed by her termination. When complainant learned that a prospective employer refused to hire her because of statements made by Trolland, complainant's Myasthenia gravis grew worse.

CONCLUSIONS OF LAW

1. Sandra L. Calvert is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, Section 5-11-10.

2. Innervision Olympic Center is an employer as defined in West Virginia Code, Section 5-11-3 (d) and is subject to the provisions

of the Human Rights Act.

3. Complainant has established a prima facie case that respondent discriminated against her on the basis of her handicap by firing her.

4. Complainant has shown that the reasons articulated by respondent for the termination of complainant's employment are pretextual.

5. Respondent discriminated against complainant on the basis of her handicap in violation of West Virginia Code, Section 5-11-9(a) by terminating her employment.

DISCUSSION OF CONCLUSIONS

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown, Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which if otherwise unexplained,

raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). The parties have stipulated that complainant suffers from Myasthenia gravis, and that Trolland, respondent's Executive Director, fired complainant on December 17, 1986. Complainant proved that her condition is a handicap within the meaning of the Human Rights Act by her un rebutted testimony that her Myasthenia gravis sometimes causes her vision, speech and muscular problems which substantially limit several major life activities. West Virginia Code § 5-11-4(t). Complainant completed her prima facie case by showing that shortly after she told the new Executive Director Trolland that she suffered from Myasthenia gravis, Trolland began to require her to complete an excessive amount of work and then he promptly fired her.

Respondent has articulated a legitimate non-discriminatory reason for terminating complainant. Respondent introduced documentary evidence which is critical of complainant's job performance.

Complainant has demonstrated that the reason articulated by respondent for her termination is pretextual. First, the testimony of complainant and her witnesses is more credible than the testimony and exhibits offered by respondent. Complainant's demeanor was very credible during her testimony. Complainant testified that respondent never even criticized her work while she was employed there. An employer cannot reasonably expect an employee to correct problems in job performance unless the employer makes the employee aware of the problem and provides the employee with an opportunity

to correct the problem. Flowers v. Crouch-Walker Corp. 552 F.2d 1277 (7th Cir. 1977). Complainant's testimony in this regard is buttressed by the testimony of two credible co-workers at respondent. The documentary evidence offered by respondent on this point is accorded no weight. Both documents are hearsay, some of the contents are double hearsay, and are therefore, of little persuasive value. Respondent failed to call Trolland as a witness or to offer his evidentiary deposition. Moreover, one of said documents contains alterations of the date, and in any event because the date is January, respondent allegedly counselled complainant regarding this incident during a time period either after she left the employment of respondent in December 1986 or before she began working there in February 1986. The date on the document, whether it is January 1987 or January 1986, belies the truth of the statement. The testimony of respondent's witnesses is similarly unworthy of credence. The testimony of Sanders is not credible because of an evasive demeanor and because her demeanor indicated that she is very hostile to complainant, and in any event Sanders testified that the Quality Assurance job, which is just one of the unreasonably large amount of tasks which Trolland required complainant to perform, was in itself an 8 hour per day job.

Complainant also demonstrated that respondent's articulated reason is pretextual by introducing into evidence a performance evaluation prepared by respondent just nine days before her termination. In said evaluation complainant received three ratings of satisfactory and two ratings of outstanding. No rating was anything

less than satisfactory. It is obvious that if respondent had problems with complainant's job performance, respondent did not let complainant in on the secret.

In respondent's post-hearing brief, counsel for respondent cleverly avoids the issue of complainant's termination and attempts to cast the issues in terms of stress and accomodation. It is clear, however, that accomodation is not in issue here; complainant was performing her job well despite her Myasthenia gravis. The stress that complainant suffered is important not in itself, but in combination with the fact that it was a result of an unreasonable workload thrust upon complainant after he learned that she had a handicap. The unreasonable workload, and its timing in connection with Trolland learning of complainant's handicap, are indicators that Trolland was motivated by discrimination based upon handicap. The central issue, however, involves not stress but whether complainant was fired because of her handicap. In view of the weak evidence for respondent on the issue of termination, it was very clever of counsel to try to focus attention on complainant's stress. It is clear from the record evidence, however, that complainant's termination was the result of handicap discrimination.

RELIEF

Complainant is entitled to backpay which she lost as a result of respondent's unlawful termination of her employment. The Hearing Examiner calculates the total backpay from the time of discharge through January 31, 1989 as \$7,710.26. See Table I. For each

month after January 31, 1989, and until a final Order is entered, an additional \$395.75 should be added to the backpay award. Complainant seeks to require respondent to pay an amount she would have received from the Veterans Administration, but complainant cites no authority to support this argument and such claim is rejected because it is not appropriate.

TABLE I

<u>Time Period</u>	<u>Monthly Salary at Respondent</u>		<u>Mitigating Income</u>	=	<u>Backpay Due</u>
		minus		=	
December 17-31, 1986 (14 days or .45 of a month)	1200 x .45 = 540	-	0	=	540
January 1987	1200	-	0	=	1200
February 1987	1200	-	0	=	1200
March 1987	1200	-	1083.33	=	116.67
April 1987	1200	-	1083.33	=	116.67
May 1987	1200	-	1083.33	=	116.67
June 1987	1200	-	1250	=	0
July 1987	1200	-	1250	=	0
August 1987	1200	-	1250	=	0
September 1987	1200	-	1250	=	0
October 1987	1200	-	1250	=	0
November 1987	1200	-	1250	=	0
December 1987	1200	-	1250	=	0
January 1988	1200	-	1250	=	0
February 1988	1200	-	1250	=	0
March 1988	1200	-	1250	=	0
April 1988	1800	-	1250	=	550
May 1988	1800	-	1250	=	550
June 1988	1800	-	1250	=	550
July 1988	1800	-	1404.25	=	395.75
August 1988	1800	-	1404.25	=	395.75
September 1988	1800	-	1404.25	=	395.75
October 1988	1800	-	1404.25	=	395.75
November 1988	1800	-	1404.25	=	395.75
December 1988	1800	-	1404.25	=	395.75
January 1989	1800	-	1404.25	=	395.75
					<u>7710.26</u>

Complainant seeks attorneys fees, and the amount of time expended by counsel appears reasonable. Counsel seeks an hourly rate of \$125.00 per hour, however, and because counsel has provided no supporting documentation for said rate it appears to be too high. An hourly rate of \$90.00 per hour is recommended.

Complainant felt destroyed by her discriminatory termination. As Trolland continued to fragrantly violate the principles underlying the Human Rights Act, even after complainant was fired, by making comments rooted in stereotypes to complainant's prospective employers, complainant's Myasthenia gravis flared up. This case would be ideal for an award of substantial incidental damages for loss of dignity, humiliation and embarrassment. It appears, however, that the recent decision of the West Virginia Supreme Court of Appeals in Bishop Coal Company v. Brenda Salyers and the West Virginia Human Rights Commission S.E.2d (W.Va. December 23, 1988) would preclude any award by the Commission of such incidental damages. Although this result seems very unfair inasmuch as complainant in this case may have relied upon precedents overruled in Salyers in making her choice of forum, the Supreme Court of Appeals did not limit the application of its ruling to future cases only, and the Commission is, of course, bound by the decisions of the Supreme Court of Appeals.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Sandra L. Calvert, Docket No. EH-419-87 be sustained.

2. That respondent rehire complainant into her former position at a rate of pay comparable to what she would be receiving but for the discriminatory termination.

3. That respondent pay complainant a sum equal to the wages she would have earned but for respondent's unlawful termination of complainant's employment. Such wages for the period from the date of complainant's discharge to January 31, 1989, would have been \$7,710.26. For each month after January 31, 1989 until the final order herein the sum of \$395.75 should be added to the backpay award.

Respondent should also be ordered to pay complainant interest on the amount of backpay owed her at the statutory rate of ten percent.

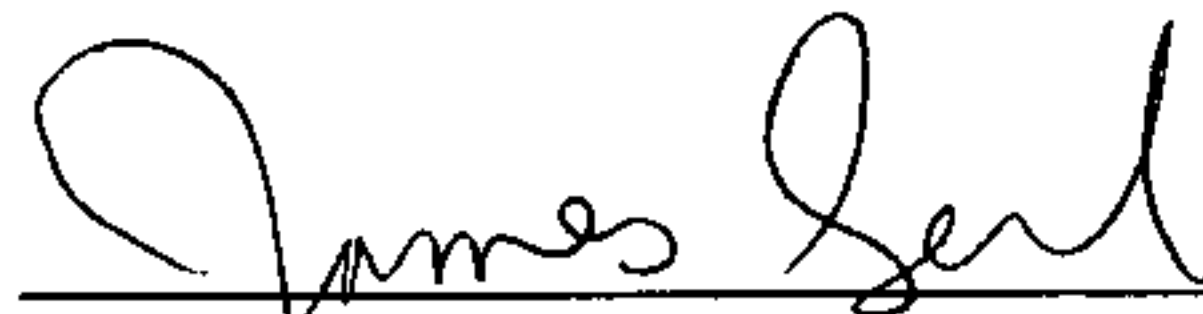
4. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of \$5,373.00.

5. That respondent be ordered to pay complainant the sum of \$58.37 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter;

6. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their handicap in making decisions regarding termination of employment;

7. That respondent report to the Commission within thirty days of the entry of the Commission's Order, the steps taken to

comply with the Order.



James Gerl
Hearing Examiner

ENTERED: January 13, 1989