STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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26 January 1994

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Re: Franczek v. Weirton Transit Corp. and City of Weirton
Docket No. EH-378-91

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 19, 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,

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
Secretary of State

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 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.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEFFREY FRANCZEK,

Complainant,

v.

DOCKET NO. EH-378-91

WEIRTON TRANSIT CORPORATION and CITY OF WEIRTON, a municipal corporation,

Respondents.

FINAL ORDER

On November 18, 1993, and January 13, 1994, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Richard M. Riffe. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the exceptions filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, ORDER as follows:

1. The administrative law judge's introductory discussion in Part A is adopted.

2. The administrative law judge's Findings of Fact are adopted with the following modification:

Finding of Fact No. 14 is modified to read as follows:

> 14. Weirton Transit Corporation must and does provide to the Mayor, the City Manager, and the City Council: an annual budget for operation of the public transit service; monthly reports of its receipts, expenditures, budget revisions, and pertinent performance data such as "ridership"; and an annual

audited financial report (assets, liabilities, receipts, expenditures and capital accounts). Also, WTC must provide the City for review, approval and submission any reports necessary for the City to acquire government subsidies for WTC.

3. The administrative law judge's finding that the complainant proved a prima facie case of handicap discrimination under the West Virginia Human Rights Act is affirmed.

4. The administrative law judge's finding that the respondents failed to prove a defense of "direct threat" is affirmed.

5. The administrative law judge's finding that both respondents are subject to the jurisdiction of the West Virginia Human Rights Act is affirmed. The legal analysis supporting the finding of jurisdiction is modified and supplemented to read as follows (page 19, Part C, section 3):

3. <u>The Respondents Weirton Transit Corporation and the City of Weirton Are Subject to the Jurisdiction of the Human Rights Act and Are Jointly and Severally Liable.</u>

In this case of employment discrimination under the Human Rights Act (the Act), both respondents are subject to the jurisdiction of the Act because both respondents meet the definition of an "employer." W. Va. Code §§ 5-11-1 to -19. The Act, § 5-11-3(d), defines "employer" as "the state, or any political subdivision thereof, and any person employing twelve or more persons within the state . . ." The Commission is guided by the Act's rule of liberal construction, found in W. Va. Code § 5-11-15, which states in part that "The provisions of this article shall be liberally construed to accomplish its objectives and purposes." In the case of <u>Paxton v. Crabtree</u>, 184 W. Va. 237, 400 S.E.2d 245 (1990), the West Virginia Supreme Court of Appeals held that the liberal construction principle applies to both substantive and procedural provisions of the Act.

The Commission finds that the City of Weirton (the City) is subject to the Act as an employer without analyzing the number of City employees. As the City is a municipal corporation, the City

is by definition a political subdivision. See Kucera v. City of Wheeling, 153 W. Va. 531, 170 S.E.2d 217 (1969) (defining the City of Wheeling as a "political subdivision"). The Act explicitly defines an employer as a political subdivision. Additionally, the City is an employer under the Act because it employs more than twelve persons.

The City's liability as an employer under the Act for the unlawful termination of the complainant follows from the City's symbiotic relationship with the Weirton Transit Corporation (WTC), its agent, and the City's delegation of a public function to WTC. The nature of the relationship is that of a joint employer and one involving state action, which are both explained below. Liability also relates back to the City because of its status as the principal and the WTC's status as the agent.[1] The Act dispenses with sovereign immunity by its inclusion of the State and political subdivisions within its jurisdiction. Further, under constitutional analysis, governmental liability cannot be eliminated by delegating powers to a private entity.

Jurisdiction exists over the City and WTC because the City is a joint employer with the WTC. The United States Supreme Court articulated the standard for "joint employer" status under the federal labor laws in the case of Boire v. Greyhound Corp., 376 U.S. 473, 11 L. Ed. 2d 849, 84 S. Ct. 894 (1964).[2] In Boire, the Supreme Court held that the joint employer status is a factual question, which examines whether one employer, while contracting with another nominally independent company, has retained for itself sufficient control over the work of the employees of the other employer. 376 U.S. at 481, 84 S. Ct. at 898-899.[3] The standard also is properly applied under the West Virginia Human Rights Act for purposes of determining whether nominally independent legal entities have chosen to handle jointly important aspects of the employer-employee relationship.

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[1]The agency theory adopted by the ALJ is affirmed and incorporated in this Final Order (Final Decision, p. 22).

[2]In Boire, the Supreme Court reversed the holding of the Fifth Circuit Court of Appeals, which had overturned the NLRB's ALJ finding that Greyhound possessed sufficient control over the employees of a company which had contracted to provide cleaning and maintenance services at terminals operated by the bus company. Boire, 376 U.S. 473, 11 L. Ed. 2d 849, 84 S. Ct. 894 (1964).

[3]This decision leaves open whether the City and WTC were in fact a "single employer" under the Act.

The facts of the case at bar disclose a joint employer relationship between the City and WTC. The City directs, through contract and personal contact with the WTC supervisor and Board, the essential terms and conditions of employment at WTC. The City dictates the scope of bus service, negotiates with other locales for WTC bus service, directs the method by which WTC employees must carry out independent service contracts and takes contractual responsibility for ensuring that the bus drivers are competent and the buses safe.[4] The City subsidizes the WTC by providing the office where employees work, the typewriter which they use, and all ancillary services (heating, electric, water, etc.). The buses to which the drivers are assigned and which carry the "WTC" logo are owned by the City. The telephone number for the WTC is listed under the government section for the City and has a city exchange.

The City Council passed the authorizing Resolution so that the City Mayor could enter into the Agreement. The Resolution plainly states that the City obtained the funds from the federal government, and the City planned to establish the WTC for the sole purpose of operating a public transit service for the City with those funds. In fact, the City officials and designees served as planners who formed the WTC, evidencing a unity of interests. The charter of the WTC provides that the arrangement established with the City is intended to maximize the financial support from the community, the state government and the federal government (Joint Exhibit No. 1, p. 1).

The result of finding a joint employer relationship under the Act is twofold. First, the City is subject to the Act's jurisdiction regardless of the status of the WTC. Second, the City and the WTC together, as the joint employer, employ more than twelve persons, which meets the jurisdictional definition of an employer. As the joint employer, both respondents are jointly and severally liable.

Jurisdiction over the WTC also is a result of state action. The WTC is an arm of a political subdivision, the City, which is subject to the Act. The WTC is subject to the Act as an employer because of the symbiotic nature of the relationship between WTC and the City of Weirton as well as the fact that the City delegated a public function to WTC.

The standard to be applied for state action where a private entity is part of a symbiotic relationship with the government is found in Queen v. W. Va. University Hospitals, 179 W. Va. 95, 365 S.E.2d 375 (1987) (finding that West Virginia University Hospital is a state actor in a wrongful discharge case). In Queen, the Court held that, "All that is necessary to determine if an entity

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[4]See footnote 5, infra.

is a state actor . . . is to *evaluate the nature and extent of state involvement so as to determine if its actions are fairly attributable to the state.*" Id. (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L. Ed. 2d 45 (1961) (emphasis added)). The Court relied on the case of Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45, (1961), in deciding that the question is whether the state has "so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity." Id. Such a determination can be made "only by sifting facts and weighing circumstances." Id.

The above joint employer analysis also serves as proof under the state action standard. But some of the most telling proof comes from the affirmative assurances given by the City, pursuant to the Urban Mass Transportation Act (UMTA), that the City has or will have "satisfactory continuing control" over the use of the facilities and the equipment. See 49 U.S.C.S. Appx. § 1602(a)(2)(A)(ii). Exercising "satisfactory continuing control" implies an ability to ensure the safe operation of UMTA-assisted facilities and equipment. 53 Fed. Reg. at 47,169. Congress has specifically authorized UMTA authority over safety in § 22 of the Act, 49 U.S.C.S. Appx. § 1618. Controlling safety means, in part, controlling the terms and conditions of employment of those employees at the local level. One example of the control being exercised has been the mandating of drug testing of all employees who perform safety-sensitive functions, which includes bus drivers.[5]

State action is also evident by the WTC's employment policy, which requires city residency. The WTC is behaving like a city by having such a requirement. The City has almost an identical residency requirement for its employees. Private enterprises do

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[5]UMTA proceeds on a case-by-case basis, evaluating each locale individually and directing local government entities to effect workplace plans, such as employee drug testing. Under Section 22, the Secretary of UMTA "may withhold further financial assistance . . . from the local public body until he [the Secretary] approves such plan and *the local public body implements such plan.*" Section 22, Urban Mass Transportation Act, 49 U.S.C.S. Appx. § 1618 (emphasis added). Thus, the employment relationship between WTC and the City is directly affected by the control which the City, as the local public body, may (and does) exercise pursuant to federal law. Here, the City has affirmed that it has sufficient control to develop any necessary plans and to impose the plan upon the WTC operation. The record discloses that Jeffrey Franczek has already been subjected to such control via drug testing; the City's continuing control is very real.

not care where their employees reside as long as they can perform their job duties. A city, however, is unique because it obtains certain benefits from a residency requirement. In one respect, a residency requirement results in the city's employees having a stake in the success of the programs because they stand to gain from the programs and they pay for them through taxes. A less wholesome benefit is vested in the elected city officials who can exercise a certain amount of leverage over their constituent-employees. The WTC is benefitting from the residency requirement just like the City because the WTC is carrying out a public function, like a city.

State action is further indicated by testimony on the record from the City that the WTC could not deliver a transit service without the City, although it could exist as a legal shell. The City decides what the service area is and whether WTC will expand. The City houses the employees and buses on a daily basis and keeps the buses in good repair. The City undertakes all of the grant application work to ensure that the bus company will receive federal funds through the City, and requires monthly and annual reports, above those required for grant applications, pertaining to all aspects of the operation, including employee accountability. There is no suggestion by either respondent that the private corporation acts like a private business or market competitor. The WTC accepts all of the benefits of the City's resources because it serves the *public function* of a public mass transit system envisioned by the City. Lastly, Mr. Franczek considered himself a City employee. Obviously, the state action has not been lost as legal fiction.

The culmination of the particular facts of this case leads the Commission to find that the WTC is an arm of the City. Thus, the Act applies to the WTC just as if the WTC were a political subdivision by definition because of the City's symbiotic and beneficial relationship with the WTC. It is important to note that the City had very good intentions when it undertook to provide the City with public transportation. The close, symbiotic relationship which subjects the City and the WTC to the jurisdiction of the Human Rights Act has also been heralded by public transportation experts as a "perfect relationship." Simply, the respondents must assume the liability where they also assume the benefits.

Lastly, the Commission recognizes the legislative intent that the Act reach unlawful conduct through the state law which has been enacted with the aim of being substantially equivalent to federal law. Under the Rehabilitation Act of 1973, Section 504, jurisdiction over the WTC for the discriminatory act complained of by Mr. Franczek would be based upon the fact that the WTC receives federal funds regardless of its number of employees or its relation to the City. See 49 C.F.R. Part 27. The Commission does not hold, however, that jurisdiction over the

WTC is justified merely because of its receipt of public funds. Rather, the particular facts and circumstances of the relationship between the City and the WTC regarding the terms and conditions of Mr. Franczek's employment support a finding of jurisdiction over respondents and liability for Mr. Franczek's unlawful termination.

6. The administrative law judge's finding is affirmed, which finds that as a result of the respondents' unlawful discrimination the complainant is entitled to an order of reinstatement to the same or a comparable position.

7. The administrative law judge's finding is affirmed, which finds that as a result of the respondents' unlawful discrimination the complainant is entitled to an order requiring the respondents to cease and desist from engaging in unlawful discriminatory employment practices.

8. The administrative law judge's finding is affirmed, which finds that as a result of the respondents' unlawful discrimination the complainant is entitled to an order of front pay until reinstated in the amount of $1,676.63 per month, plus any increment or across-the-board raises he would have received; backpay and interest in the amount of $42,212.28; and incidental damages in the amount of $2,950.00.

* * *

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

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 26th day of January, 1994, in Charleston, Kanawha County, West Virginia.

QUEWANNCOIY C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEFFREY R. FRANCZEK,

Complainant,

v. DOCKET NUMBER: EH-378-91

WEIRTON TRANSIT CORPORATION
dba CITY OF WEIRTON

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A.
BOILER PLATE

This matter came on for hearing on 26 and 27 April 1993 in Hancock County at the Hancock County Courthouse, New Cumberland, West Virginia. The complainant, Jeffrey R. Franczek, appeared in person; the Commission appeared by Deputy Attorney General Mary C. Buchmelter; the respondent, Weirton Transit Corporation, appeared by its personal representative, Carl Fodor, and by its attorney, Jeff Rokisky; the respondent, City of Weirton, appeared by its attorney, Joseph B. DiBartolomeo.

I have read the transcript and the parties' proposed findings of fact, conclusions of law and argument in support thereof. Where the testimony of any witness is not consistent with the findings of fact as stated herein, that testimony was not credited. Where any finding of fact should have been labeled a conclusion of law or vice versa, it should be so read. The findings of fact are based upon the evidence produced taking into account each witness' motive, state of

mind, strength of memory and demeanor while on the witness stand and considering the plausibility of the evidence in view of the other evidence of record.

B.

FINDINGS OF FACT

1. Complainant is a white male and a resident of West Virginia. He graduated from Oak Glen High School in New Manchester, West Virginia in 1977. He has worked steadily in a variety of jobs since graduation. In the late summer of 1990 complainant applied for a position at Weirton Transit Corporation, the bus company for the City of Weirton. He was interviewed by Carl Fodor, Transit Manager of Weirton Transit Corporation. Franczak was hired for the position and began work on or about 20 August 1990.

2. He rode with another driver until he was familiar with the route. He was instructed in the necessary maintenance procedures before taking out the bus and when returning the bus. Since his employment was prior to the recent regulations which require commercial driver's licences he was able to begin employment immediately.

3. While working as a bus driver, complainant worked Monday through Friday at least 40 hours per week. At times he worked overtime. His average work week was approximately 44 hours per week. At all times while in the employ of respondents, Franczek was directed to live in the City of Weirton, as were employees of the City.

4. Mr. Franczek was a full-time employee. He was paid approximately $7.25 per hour. He received life insurance and full medical insurance under the State of West Virginia medical care plan (West Virginia PEIA) for which Weirton Transit Corporation pays monthly premiums. He was also issued a uniform.

5. Franczek enjoyed his employment. He was competent. He came to know people on his route and became friendly with the regular customers. He had no accidents, traffic tickets, or disciplinary reports. He felt that he had found the perfect job for him and enjoyed the employment security it offered.

6. Although Mr. Franczek's professional life was going well, he was having problems in his personal life. Shortly after beginning his employment his relationship with his significant other took a turn for the worse. He moved out of the apartment that he shared with her and moved into an apartment alone. The break-up and his living arrangement affected him emotionally. He realized that his drinking could get out of hand and decided to seek help. At no time during this period did Mr. Franczek drink while on the job or report for work under the influence of alcohol. In fact, respondents have never intimated that he had. There are no disciplinary reports or allegations of improper behavior. Mr. Franczek's alcohol abuse, such as it was, occurred off the worksite.

7. Early on the morning of approximately 8 November 1990, Franczek called the addiction recovery program at St. John's Medical Center in Steubenville, Ohio and asked for help. He was instructed to come in immediately. He went to the bus garage and arranged for someone to cover his shift. He went to St. John's and was urged to

stay and enroll in their 30-day inpatient rehabilitation program. Franczek immediately expressed reservation about his ability to commit to a 30-day stay. He communicated his concern about his employment and was assured that everything would be alright. His therapists agreed to talk to his employer and, in fact, did talk to Mr. Fodor about their recommendation that Mr. Franczek commit to the 30-day hospitalization. Mr. Fodor assured both Mr. Franczek and the rehabilitation team that a job would be awaiting Mr. Franczek upon his completion of his rehabilitation program.

8. Complainant stayed for about three weeks rather than for the entire 30-day program because of insurance coverage problems. His therapist nevertheless considered him to have successfully completed the program. He presented himself at Weirton Transit on approximately 3 December 1990 fully expecting to resume his employment. He felt well and confident that he had overcome his problem. He looked forward to returning to his job. He met that day with Carl Fodor who told him that he (Franczek) could not return to work until after a meeting about his reentry into employment. Fodor said they might have to "probate" him for awhile before he could drive. Franczek stated that he had no problem with that and would do whatever was necessary to prove himself. Fodor told Franczek that he would try to find him another job with the City.

9. Although Franczek wanted to be returned to his job and never doubted that he could perform the duties, he was agreeable to any job. Franczek was never put to work by Carl Fodor and, on approximately 28 December 1990, he received a letter from Fodor

(dated 20 December 1990) officially terminating him from his position due to "personal reasons".

10. Complainant was terminated because he had entered an alcohol addiction program.

11. Franczek was devastated and emotionally damaged by the termination. He was humiliated and embarrassed.

12. There is a contract between the City of Weirton (City) and Weirton Transit Corporation (WTC). It states that "it is the determination of the City of Weirton that an agreement be entered with the Weirton Transit to 'operate a demonstration of public mass transit service for the City of Weirton.' "

13. WTC legally obligated itself to "begin and maintain a public transit service over and upon the streets of the City [of Weirton]." Although WTC has control over its own employees, it can "supervise, evaluate and recommend to the City any necessary discipline" of City employees. Weirton Transit cannot extend more than ten per cent of its service beyond the City limits of the City of Weirton unless it has the approval of both the Mayor and the City Council, along with the Weirton Transit Board.

14. Weirton Transit Corporation provides to the Mayor, the City Manager, and the City Council an annual budget for operation of the public transit service. In addition, WTC must and does provide to the Mayor, the City Manager, and the City Council monthly reports of its receipts, expenditures, budget revisions, and pertinent performance data such as "ridership". WTC must submit audited financial reports to the City annually. WTC must submit any reports necessary for the City to acquire government subsidy for WTC.

15. Both the Mayor and Transit Manager Fodor are non-voting members of the WTC Board of Trustees ("Board"). The Mayor's representative as Board member was James Lord, the City Manager. During Franczek's employment, Mario Pipinos was both a Board member and Weirton City Council member. WTC is still obligated contractually to "obtain Director's and Officer's Liability Insurance on its Board of Trustees," which includes the Mayor. The City allows the Board to conduct its meetings in a large room on the second floor of the City Building. No other private corporations conduct meetings in the City Building.

16. The City-WTC contract expressly states that any extension of service must be approved by both the Mayor and City Council along with the Weirton Transit Board. The minutes from the Board meeting of 17 September 1990 revealed that the Transit Director told the Board that the City Council had approved an extension of transit service to New Cumberland.

17. The WTC Board has its office in the Weirton City Building. WTC is the only private corporation that has an office in the City Building.

18. A typewriter is the only capital item that Weirton Transit owns. All other office equipment items, such as the desk and cabinets, are owned by the City of Weirton. The City uses its paint to provide painted delineations to mark the bus stop zones in the City of Weirton. The City purchases buses and leases them to WTC. The City provides to WTC the services of garage storage and maintenance for the buses. The City leases three buses to WTC for $1.00.

19. The City provides Weirton Transit with photocopying materials and services, garbage and trash removal services, water supply services and waste water disposal services.

20. The City pays for lighting, heating and cooling services for WTC.

21. The City receives operating subsidies from governmental sources, such as Federal Transit Administration and Urban Mass Transportation Administration, and gives them to WTC to enable it to cover operating expenses and capital expenditures.

22. WTC, with approval of the City, established transit service between Weirton and New Cumberland for several months and then discontinued it.

23. The Transit Director regularly attends City Council meetings. He also regularly attends the City's department head weekly meeting to inform the department heads about WTC's performance. The Transit Manager and the department heads from the City's Street Department, Public Works Department, and Police Department meet together weekly to effectively communicate between departments.

24. I do agree with the following of respondent's assertions concerning the relationship between the City and WTC: WTC has its own Board of Directors, separate from the City of Weirton's City Council; WTC's employees are paid by WTC, not the City of Weirton; the City of Weirton has a formal job process which none of WTC's employees or applicants have gone through; and the method that the City of Weirton's City Manager participated in the day-to-day

operations of the WTC was as a member of their Board and through participation in their Board meetings.

25. WTC does not have 12 employees, unless its employees are aggregated with City employees, in which case it has well over 12 employees.

26. Findings concerning cost, wages and benefits are set out in the Relief portion of this Order, infra.

C.

DISCUSSION

1. The History of Federal Laws Protecting Alcoholics

As the Attorney General points out, it is well established in federal law (after which the Human Rights Act is modeled) that recovered alcoholics[1/] are deemed handicapped and entitled to protection from discrimination based upon that handicap unless the respondent demonstrates that the absence of such a handicap is a relevant job qualification. For this proposition the State cites Railway Labor Executive's Association v. Burnley, 839 F.2d 575 (9th Cir. 1988); Burka v. New York City Transit Authority, 680 F.Supp. 590 (S.D.N.Y. 1988); and Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981).

1/ The designation of one as a recovered or a recovering alcoholic is a matter only of semantics. In the book Alcoholics Anonymous, A.A. World Services, Inc. (1939), from which the organization derived its name, the title page indicates that it tells the story of how alcoholics recovered from their condition. The terms are used interchangeably herein and no distinction should be inferred by their alternative use.

In 1973 Congress passed Title V of the Rehabilitation Act, which included the first federal laws prohibiting discrimination against people with disabilities, including recovered alcoholics and addicts. Section 504 applies to all programs and activities that receive federal financial assistance,[2/] such as WTC. (See finding of fact no. 21.)

Section 504 was patterned after Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination in federally assisted programs, and Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally assisted education programs. Section 504 provided simply that:

> "No otherwise qualified handicapped individual in the United States,...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Section 504 was the forerunner of the 1990 Americans with Disabilities Act (ADA) and the source of many of the specific requirements adopted by the ADA. The ADA prohibits discrimination against individuals with disabilities, including recovering alcoholics and drug addicts.

Section 504 and the ADA generally focus on preventing discrimination against individuals with functional limitations, such as vision or mobility impairments. Thus, although many of the specific requirements do not relate specifically to people "in

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[2/] Complainant could have brought this action before the U.S. Department of Transportation pursuant to 49 CFR Part 27. There is no requirement that an entity have any certain number of employees in order to be covered by Sec. 504.

recovery" (to put it in the vernacular), many requirements of the statutes are important to eliminating discrimination against such persons. In all of the statutes (and in our Human Rights Act), a "disability" (or "handicap") is a "mental or physical impairment that substantially limits one or more major life activities," and an individual with a disability is one who has such an impairment, has a history of such an impairment, or is regarded as having such an impairment.

The legislative history of the statutes makes clear that alcoholism and drug addition are included in the definition of disability, and coverage of these conditions is not open to dispute. A person with a "history" of alcoholism or addiction is also covered, so "former" alcoholics and addicts are also included. A person in recovery, such as Mr. Franczek, may be considered a "former" alcoholic or addict, rather than a current alcoholic or addict under federal guidelines. The Equal Employment Opportunity Commission (EEOC) Technical Assistance Manual says that a person who is addicted to drugs, but is no longer using, is protected from discrimination on the basis of "past drug addiction" rather than a current addiction. (EEOC Manual at VIII-3.) Because people in recovery are covered in either case, any question of whether addiction is a permanent condition does not affect their rights under the statute, nor Mr. Franczek's under the Human Rights Act.

The ADA does not prohibit discrimination based on an individual's <u>current</u> illegal use of drugs--"controlled substances" as defined under federal law. Alcohol is not a controlled substance, so its use is not covered by this exception. The <u>use</u> of alcohol or other drugs is not a disability, so it is not protected under the

ADA, but addiction to alcohol or drugs is a disability, so alcoholics and addicts generally are protected from discrimination so long as they are not using.

As explained in the preamble of the Department of Justice's regulations implementing Title III of the ADA:

> "The statute also distinguishes between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act.
>
> * * *
>
> Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs." (56 Federal Register 35,561 (July 26, 1991).)

The EEOC's regulation implementing Title I (employment) of the ADA does not define "current" illegal use. The Department of Justice's regulations define it as "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." (28 CFR §35.104; 28 CFR §36.104.) Apparently, in order for an alcoholic who does not use illegal drugs to lose his protection under the Act, he would have to drink and commit job related infractions such as appearing at work intoxicated, excessive absenteeism or the like. This is not clear, however, and will have to be clarified by interpretive decisions. In any event, it is not relevant to this claim.

For people newly recovered, there may be some question about whether past illegal drug use is recent enough to be considered "current". A positive result on a drug test is considered sufficient

to establish "current" use (assuming that the test accurately identifies a controlled substance and the use is not legal). (EEOC Manual at VIII-2.) A person who is currently participating in a supervised rehabilitation program is protected, however, if he or she is not engaging in current illegal use of drugs. (So, too, is an alcoholic in treatment protected, of course.)

The statutes also provide that people who have successfully completed a supervised drug rehabilitation program or have otherwise been rehabilitated successfully (such as Mr. Franczek) are protected from discrimination on the basis of addiction so long as they are not engaging in current illegal use of drugs. The phrase "have otherwise been rehabilitated successfully" includes rehabilitation through programs such as Alcoholics Anonymous or Narcotics Anonymous.

Both section 504 and the ADA specifically authorize a covered entity to exclude people with disabilities if their participation would pose a "direct threat" to the health or safety of others. (The "direct threat" language is included in Titles I (29 CFR §1630.2(r)) and III (28 CFR §36.208) of the ADA, and the concept is incorporated under other provisions of section 504 and Title II (see Title II preamble at 56 Fed. Reg. 35,701).) This concept is likely to be applied in situations involving recovered people. For example, an employer could argue that it can refuse to hire a recently recovered alcoholic because her employment in a sensitive job would result in a direct threat to others, or a state licensing authority may argue that a recently recovered addict is not qualified for a license for the same reason.

Because arguments about safety have often been used to justify discrimination against individuals with disabilities, the regulations establish specific requirements for excluding an individual on the basis of a "direct threat". These requirements were intended to address situations involving people with AIDS or HIV infection, but they apply equally to any situation where safety concerns are used to justify exclusion of an individual with a disability. The basic principle is that there must be a significant risk of substantial harm, and that the determination cannot be based on generalizations or stereotypes about the effects of a particular disability.

For a person in recovery, the risk would generally be the possibility of relapse and the harm that would result. The factors that are important in applying direct-threat analysis to these cases are the severity of the risk and the probability that the injury will actually occur.

Establishing the severity of the risk would involve determining the amount of harm that could result if the person relapsed. Where relapse would be unlikely to result in substantial harm, the possibility of its occurrence would not rise to the level of a direct threat. For example, a clerical worker is unlikely to threaten the "health or safety of others," even if he relapsed and began coming to work while impaired. In this situation, the employer could not refuse to hire the individual before the relapse, but could fire the person for unsatisfactory performance after the relapse.

In other situations, however, a relapse could result in a significant risk of substantial harm. For example, an airline pilot in relapse might attempt to fly while intoxicated and cause a serious

accident, or a person with a license to practice medicine could injure a patient.

In such situations, it would be appropriate to consider the second factor: the probability that relapse would occur. This determination requires an individualized assessment based on reasonable judgment that relies on current medical knowledge or the best available objective evidence. The requirement for an "individualized" assessment means that the particular individual's condition must be considered.

For someone in recovery, predicting the possibility of relapse may be difficult. The length of recovery would be important, but the inquiry could extend to other factors. The EEOC's list of relevant evidence to be considered includes:

> "input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability."

Other factors that are considered in determining whether a person may be excluded under "direct threat" analysis include the duration of the risk and the possibility that it could be mitigated by reasonable accommodation or modifications in the program. Because the possibility of relapse is not limited to a specific time period, the "duration" of the risk will generally not be a factor in cases involving people in recovery.[3/]

[3/] The foregoing analysis of the history and scope of federal protection for (Footnote Continued)

2. Analysis of Complainant's Case.

West Virginia Code §5-11-9 states that: "[i]t shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification...[f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is...handicapped...."

Although the West Virginia Supreme Court of Appeals recently stated the criteria for establishing a prima facie case of unlawful discriminatory discharge due to handicap in Morris Memorial Convalescent Nursing Home, Inc. v. WV Human Rights Commission, 21456, (WVSCA 21 May 1993), this case does not fit neatly into that template. There the Court set out, in Syllabus point two, what a complainant must prove when an employer is asserting that it did not discharge the complainant due to his protected class status. It is unwieldy in this instance as the respondent admitted--indeed

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(Footnote Continued)
recovered alcoholics borrows heavily and quotes directly from a paper published by U.S. Department of Justice Attorney Sara Kaltenborn, an employee of Justice's Civil Rights Division. Her article is described as expressing her views, rather than the Department's. After I had excerpted her article as appears above, I spoke with Ms. Kaltenborn. She advised me of the existence of the Department of Transportation's procedure, set forth at 49 CFR Part 27.123(b), whereby federal funds will be pulled from grantees who have violated the Rehabilitation Act, as WTC has here, unless the grantee remediates its violation. Inasmuch as she simply pointed me to existing law, I do not feel the need to afford the parties an opportunity to respond, other than on appeal, to the advice I received from her. (See, Canon 3(A)(4) of a Proposed Code of Conduct for Administrative Law Judges, which I submitted to the Supreme Court of Appeals on 16 December 1992, a code of conduct to which I voluntarily conform my behavior.)

asserted--that it was discharging complainant precisely because of his protected class status, namely being a recovered alcoholic. Here the respondent, through its own witnesses, indicates that the basis of its decision was "the possibility of an accident occurring and people coming back to us". The respondent stated that it made its decision "from a risk point of view". In other words, complainant was discharged because of his handicap.

It seems to me almost tautological to analyze whether a complainant has made a prima facie case under Morris Memorial where a respondent asserts that it did, indeed, discharge a complainant due to his handicap status as that defense essentially makes out the complainant's prima facie case. Nevertheless, tautological though it may be, I do find that the complainant stated a prima facie case under Syllabus point two of Morris Memorial.

First, as a recovered alcoholic the complainant meets the definition of "handicapped". Second, he is a "qualified handicapped person". "A 'qualified handicapped person' under the West Virginia Human Rights Act is one who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." Id. at Syll. pt. 3, citing Coffman v. Board of Regents, 386 S.2d 1 (WV 1988) (emphasis in original). There was no dispute that complainant was well qualified to perform his duties as a bus driver and his drinking had never been an issue. In fact, there was never even a suggestion by the employer that it had any idea that he had a drinking problem. It is plain that he was qualified to perform the duties of a bus driver. All that stood in the way of his doing so was the respondents' stereotypical and

ill-informed prejudices. Third, all agree he was discharged. I suppose the dispute, such as it was, revolves around whether complainant is a "qualified handicapped person". The plaintiff bears the ultimate burden of proving that despite his handicap he is qualified. Doe v. New York University, 666 F.2d 761 (2nd Circuit 1981). I conclude that the complainant did indeed meet this burden of persuasion.

Further, the respondent offered no evidence whatever to demonstrate that the complainant's handicap was relevant to the job qualifications. No transportation experts were called. No data was introduced relative to the frequency with which recovered alcoholics are involved in vehicle accidents as compared to the general population. No medical experts were called to demonstrate that being a recovered alcoholic impairs one's ability to perform the essential functions of the bus driver's job. No evidence was introduced concerning the likelihood of relapse. No evidence was introduced which tended to suggest that one who had never drunk on the job would be more likely to do so after having recovered from alcoholism. There was not even any evidence that respondent Weirton Transit Corporation had anecdotal negative experience with recovered alcoholics.

Rather, (somewhat amazingly) to the extent that the respondent even tries to argue that it was justified in discharging the complainant due to his alcoholism, it does so simply by throwing up the stereotype concerning this particular handicap. It apparently relies on the defense, "Why, everyone knows you can't have a recovered alcoholic driving a bus!" to save the day. Analytically,

their defense strikes me as identical to the following: "Why, everyone knows blacks can't eat at the same counter as whites!"

In the context of this case, judicially recognized defenses available to the respondent are as follows: (1) its decision was based on a bona fide occupational qualification; (2) complainant's impairment precluded him, with or without reasonable accommodation, from safely and adequately performing the essential elements of the job;[4/] or (3) continued employment of the complainant would impose undue hardship upon the respondent. Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981).

The Human Rights Act provides an exception to the prohibition of handicap discrimination when such discrimination is based upon a bona fide occupational qualification. However, in order to establish a bona fide occupational qualification, the respondent must prove that all or virtually all persons with the complainant's particular handicap would be unable to perform the essential functions of the job of a bus driver or that the job cannot be safely performed by a person with complainant's handicap even with reasonable accommodation. The record is devoid of any evidence presented by the respondent which establishes a factual basis for determining that all or substantially all recovered alcoholics could not safely and

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[4/] The issue of reasonable accommodation was not raised by the complainant, nor considered by the respondent prior to discharge. One imagines that it wouldn't be too difficult for the dispatcher to sniff the complainant's breath and observe his appearance if there had been any reason to suspect that recovering from alcoholism might cause him to start coming to work drunk.

efficiently perform the duties of a bus driver. Weeks v. So. Bell Telephone & Telegraph Co., 408 F.2d 228 (1969).

The respondent apparently does maintain that complainant's impairment precluded him, individually, from safely and adequately performing the essential elements of his job. The record again totally belies respondent's contention. The respondent presented no evidence to this effect.

Respondent's "risk" justification of its decision--that it terminated the complainant on the basis of a belief that the complainant's disability created a risk of future injury to himself or others--is thus similarly rejected. Exclusion of an employee because of the risk of the future worsening of the employee's condition has been determined in many jurisdictions to constitute illegal discrimination, absent a showing by the employer of undue hardship and of a factual basis to believe to a reasonable probability that continued employment of that employee would be hazardous to the health and safety of the handicapped employee or others. Bucyrus Erie Co v. DILHR, 280 N.W.2d 142 (Wis. 1979).

Stated simply, the complainant has sustained his claim of handicap discrimination.

3. The Respondents are an Employer Under the Human Rights Act

The more difficult question, by far, is whether the respondent City of Weirton's employees should be counted towards the total number of employees in order to make the respondent WTC answerable for its blatant discriminatory conduct. The fact that the City

itself follows a lawful and progressive policy with respect to its recovered alcoholic employees, including those who are truck drivers, makes this a particularly sticky wicket.

The State essentially concedes that under traditional federal tests for determining whether the jurisdictional threshold number of employees are present, complainant loses. (Notwithstanding that the Rehabilitation Act has no "minimum number of employees" requirement.) Our Court hasn't yet addressed this issue, but several cases are percolating through the system at present which will provide the Court an opportunity to speak. (I have three in which I will issue decisions this month.)

Our definition of "employer" is broader than the federal definitions are. Code §5-11-3(d) states that the "term 'employer' means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state". "Person" means:

> "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Code §5-11-3(a). (Emphasis added.)

Title VII of the Civil Rights Act of 1964, 42 U.S.C.§2000e et seq. and the Americans With Disabilities Act, 42 U.S.C.§12101 et seq., in their definitions of "employer", require that an entity have more employees than the State Human Rights Act requires; they are thus more narrow than the Human Rights Act. Likewise, the definition of "person", contained within the definition of employer is more narrow under both Title VII and the ADA than under the Human Rights Act.

The Title VII definition (incorporated into the ADA by reference) of "person":

> "includes one or more individuals, governments, governmental agencies, political subdivision, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in [bankruptcy] or receivers."

Conspicuously absent from the federal definition is the phrase "other organized groups of persons", as found in the State Human Rights Act. It is thus clear from the fact that the State Legislature made the HRA applicable to employers with fewer employees than required under Title VII and the ADA, and from the fact that they make the HRA apply to "other organized groups of persons", while neither Title VII nor the ADA have such application, that our Legislature intended the coverage of the HRA to be broader than its federal counterparts.

As previously stated, the respondent would be answerable to the complainant for this violation under the Rehabilitation Act because WTC receives federal funds from the Department of Transportation's Federal Transit Administration and Urban Mass Transit Administration. There is no requisite minimum number of employees under the Rehabilitation Act in order to invoke its protections. 49 CSR Part 27. I think it unlikely that our Court would find a violation which can be reached in federal law to be unreachable under the Human Rights Act when the Legislature has, as here, manifested a plain intent that the Human Rights Act's reach should be broader than that of the ADA and Title VII. I thus conclude that the relationship

between WTC and the City, as set out in the findings of fact above, are encompassed within the phrase "other organized groups of persons".

Finally, and alternatively, I accept the State's argument that the Supreme Court of Appeals would find persuasive the dissent's logic in Massey v. Emergency Assistance, Inc., 724 F.2d 690 (8th Cir. 1984). I will not engage in the needless generation of paper by rewriting that which the Attorney General has so cogently written at pages 16 through 24 of her brief; rather, I incorporate it herein verbatim by reference.

D.

RELIEF

It is, accordingly, ORDERED that respondents shall reinstate complainant to his former job or a comparable position. It is further ORDERED that respondents shall pay complainant front pay in the amount he would have received in total pay and benefits, ($1,676.63 per month plus any increment or across the board raises he would have received) from and after the date of this Order through the date of his reinstatement, such front pay to be paid in regular biweekly installments. It is further ORDERED that the respondents shall pay the complainant back wages plus prejudgment interest in the amount of $42,212.28.

Substantial digression is required at this point because the Commission continues to attempt to foist upon complainants an improper conservative method for calculating interest on back pay rather than the more liberal method provided for by law. There can be no

argument that the Commission's new conservative method is not "fair"; it is. It is, however, contrary to the statute and inevitably inures to the detriment of complainants. This anti-injured worker approach was sold to the Commission via the disingenuous device of citing authority from other jurisdictions which use compounding interest approaches. Their approaches were derived from their law, not West Virginia's. This was crafty and not straightforward because none of the foreign jurisdictions cited have our more liberal interest law. I will not be surprised if the Commission eventually succeeds in convincing the Supreme Court of Appeals to allow--and perhaps even to impose--this "better idea" into the framework of employment law and possibly even personal injury law in West Virginia; conservative ideas seem more palatable when they come from supposedly liberal quarters. (The Commission is liberal by statute. Code §5-11-15.)

In addition to arguably being legal error, it is unbecoming that the Commission should lead an assault on rights already provided by statute to injured victims. The Commission does not understand what it has done in rejecting a relatively simple and liberal statutory scheme for awarding interest and inserting in its stead a conservative and more complicated[5/] "better idea". Not only

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5/ The conservative "better idea" is so complicated that it literally requires either a computer program or hours of manual calculations for the data in a typical case. That may be one of the reasons why the proper and legal method provided by statute is as it is: simplicity. If the Commission is going to continue down this road, then it must buy its ALJs the programs and computers to check the accuracy of these calculations. Likewise, the Supreme Court will have to buy similar materials for circuit court judges. In this case the "better idea" proved complicated enough that the Commission's counsel didn't even get the figures right. See, supra, at pages 31 and 32.

has the Commission violated the liberality rule by taking a conservative position on the calculation of interest, it has done so in the face of plain and compelling statutory law and case law requiring the more liberal result. There is absolutely no West Virginia authority, statutory or decisional, for the conservative approach urged by the Commission (although there may well soon be if the Commission continues to follow this approach).

Since the Commission does not understand what it has done with interest calculations and since it is receiving its legal counsel from the proponents of this conservative policy, it should solicit amicus briefs from the Trial Lawyers Association, the Lawyers Guild or a similar organization that has the interests of the injured at heart. The Commission should also have these individuals spend time with the Commission to make sure it understands this issue.

I will next write a section showing the error of the conservative approach to interest on back pay awards. I include it, as indicated, in orders until either the Commission convinces the Supreme Court of Appeals to use this anti-injured-worker approach or until the Court tells the Commission it is wrong.

The correct method for calculating prejudgment interest on back pay and other special damages (i.e. pre-trial out-of-pocket losses), the only method I find to have been approved by the Supreme Court

of Appeals[6/], the method which has never been disapproved by the Court, is as follows:

> If a wrongful discharge of a $10,000 per year employee is today adjudged to have occurred eight years ago to the day, the prevailing complainant would receive $144,000; $80,000 in lost wages plus 10% ($8,000) per year times eight years on the entire amount with no compounding.

The Supreme Court of Appeals has approved this method over and over again, and it has even done so indirectly in human rights cases. See, e.g. Frank's Shoe Store v. Human Rights Commission, 365 S.E.2d 251 (WV 1986).

During the last decade, the Supreme Court of Appeals has, on at least four occasions, dealt directly with questions surrounding prejudgment interest. Kirk v. Pineville Mobile Homes, 310 S.E.2d 210 (WV 1983); Grove v. Myers, 382 S.E.2d 536 (WV 1986); Miller v. Monongahela Power, 403 S.E.2d 406 (1991); and, Beard v. Lim, 408 S.E.2d 772 (WV 1991). These cases discuss our law, not EEOC's or some other foreign jurisdiction's law. The decision in Miller v. Monongahela Power is the most instructive of these decisions because the Supreme Court of Appeals actually tells us precisely what is the "correct" amount of prejudgment interest, and provides a template for tribunals to apply to calculate prejudgment interest awards. But

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6/ If an expert witness testifies during trial as to the amount a victim has lost out-of-pocket and during her testimony indicates the present value of such pre-trial out-of-pocket loss, and such amount includes interest, and the jury returns a verdict reflecting that amount, then the trial court cannot add statutory prejudgment interest, Miller v. Monongahela Power, 403 S.E.2d 406 (WV 1991). This does not affect the manner in which trial courts (and, concomitantly, ALJs) are required to calculate prejudgment interest pursuant to Code §56-6-31, when it has not been included in a jury award.

lets examine the most recent case first, and then look at Monongahela Power.

The court in Beard first quotes the statutory language of Sec. 56-6-31. The pertinent provisions are:

> "If the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued... Special damages includes lost wages and income..." Id. at page 775.

Please note that, although this language is relatively clear and unambiguous, enough confusion has arisen that the Court has had to explain its meaning. At page 776 of the opinion they indicate,

> "We further held that 'prejudgment interest on special damages...is calculated from the date on which the cause of action accrued, which in a personal injury action is ordinarily when the injury is inflicted."

If the plain language of the statute and the opinion are not sufficient, then look at what the Court did in the final paragraph of the opinion. They remanded to the circuit court with directions to enter judgment with prejudgment interest being added to the special damages. (The trial court had added interest on both generals and specials.) The Supreme Court added the medicals and the lost wages and ordered that interest be calculated on all of these specials. This, despite the fact that the plaintiff's lost wages accumulated over a period of time following the date the injury was inflicted. One might still argue that this doesn't demonstrate how interest was to be calculated were it not for the Monongahela Power case.

In Miller v. Monongahela Power the Court used simple interest on the entire lump sum amount of the special damages awarded, despite

that lost wages had accrued incrementally after the date of injury. Here are the relevant data:

1. The complainant's total jury award was $997,337.30.

2. The date of injury was 16 February 1979 and the date of verdict was 23 June 1989.

3. "Prejudgment interest at the correct statutory rates is $937,807.92." Miller at 415. (Note that this is a direct quote with emphasis added.)[7/]

One must work backwards from these figures to see that simple interest on the entire sum was awarded:

6% of $997,377.30 = $59,842.64 per year until 5 July 1981 (the date after which the statute increased interest from 6% to 10% per annum)

16 February 1979 - 16 February 1980 = $59,842.64

16 February 1980 - 16 February 1981 = $59,842.64

16 February 1981 - 5 July 1981 = $22,955.64
(38.36% of one yr.)

10% of $997,377.30 = $99,737.73 per year until verdict

5 July 1981 - 5 July 1982 = $99,737.73

5 July 1982 - 5 July 1983 = $99,737.73

5 July 1983 - 5 July 1984 = $99,737.73

5 July 1984 - 5 July 1985 = $99,737.73

5 July 1985 - 5 July 1986 = $99,737.73

7/ The parties stipulated and the Court accepted that this was the correct amount of prejudgment interest. While one might argue that accepting and publishing a stipulation that this is the correct prejudgment interest is not tantamount to the Court showing its own calculations, it is plain that the Court has repeatedly accepted this method of calculation and has never even hinted that the interest should be reduced in the manner suggested by the Commission.

5 July 1986 - 5 July 1987	= $99,737.73
5 July 1987 - 5 July 1988	= $99,737.73
5 July 1988 - 23 June 1989 (96.44% of one yr.)	= $96,187.06

The total of these amounts is $936,992.09. The minor difference of less than $1,000 (or approximately 1/10 of 1 percent) between this figure and the figure of $937,807.92 stated in the Miller opinion is the result of the varying ways one can calculate the portion of the years represented by the time periods from 16 February 1981 through 5 July 1981 and from 5 July 1988 through 23 June 1989. Some people count days by the Rules of Civil Procedure, some don't; some use a per diem rate--some use a percentage or fraction of a year. See, for example, page 30 of this order where, for purposes of illustration, I use the per diem method to calculate lost wages, and the percentage of a year method to calculate interest. Either is correct, but they will vary by as much as .1% (which is one dollar for every thousand).

In Grove v. Myers, supra, the Supreme Court stated clearly that it is the duty of the trial court, (and, concomitantly, ALJ's) not the jury, to calculate prejudgment interest and add it to the special damages award. Id., 537.

In Frank's Shoe Store, supra, in addition to $173.40 in special damages the complainant was awarded $10,322.40 in back wages. The Court stated that "added to this amount was the accrual of one year's prejudgment interest at 6%, which raised the total to $11,115.14." The Court then held, "We find that such an award was appropriate." Let's do the math: $10,322.40 x .06 = $619.34.

$173.40 + $10,322.40 + $619.34 = $11,115.14. Thus, it is plain that in this human rights case the Supreme Court of Appeals approved the award of a full year's interest on the full year's back wages despite that they would have accrued incrementally. (Neither the Court nor the Commission, apparently, noticed that plaintiff should have received interest on the $173, too.)

I find no West Virginia cases permitting or requiring trial courts to use the conservative compound interest scheme the Commission has adopted. Our Court allows an easier and more generous simple interest scheme. The Commission has been sold a bill of goods and has sold complainants down the river.

This being the state of facts, I am in a quandary about what I should do. My options are four-fold at least. The first option is that I could simply follow the Commission's prior decision and not say why I think it is wrong. Obviously, I've rejected that option. The second option is to follow the Commission's prior decision, but state why I think it is wrong. Third, I could decline to follow the prior decision and state why it was wrong. Fourth, I could ignore prior decisions and assume that they have no precedential value. (Again, I've obviously rejected that option.)

According to Alfred S. Neely, IV, in his definitive treatise Administrative Law in West Virginia, Michies, 1982, there is no precedential value in prior agency decisions. He says,

> "[T]he Court has observed recently that 'it is generally recognized that the doctrine of stare decisis does not normally apply to administrative decisions.' C & P Telephone Co. v. PSC, 288 S.E.2d 496, 502 (WV 1982) The case before the Court concerned the legitimacy of a Public Service Commission order in a telephone ratemaking proceeding. Some of the matters at

> issue had been considered and found reasonable in three prior PSC proceedings involving the same firm, yet the Court observed that 'the Commission's decisions in previous cases...do not preclude it from reaching the opposite result in this case.'[8/] Id." Neely at §6.05, 1983 supplement.

Under the doctrine of "stare decisis", when a "point of law has been settled by decision, it forms precedent which is not afterwards to be departed from..." Black's Law Dictionary, pg. 261, 5th Ed., West Publishing, 1979, citing Colonial Trust v. Flanagan, 344 Pa. 556, 25 A.2d 728. "Precedent" is defined as "an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards." Id. at 1059. The term "authority" refers,

> "to the precedential value to be accorded an opinion of a judicial or administrative body. A court's opinion is binding authority on other courts directly below it in the judicial hierarchy. Opinions of lower courts or of courts outside of the hierarchy are governed by the degree to which it adheres to the doctrine of stare decisis. See, Stare decisis." Id. at 122.

Since the "doctrine of stare decisis does not normally apply to administrative decisions" in West Virginia, C & P v. PSC, supra, then I am, I think, ethically, morally and duty bound to write what I believe is a correct decision and leave it to the Commission to reverse me if it chooses to.[9/]

[8/] The decision cited by Neely was pulled from 288 S.E.2d 496 due to the Court granting a petition for rehearing. The new decision, published at 300 S.E.2d 607, did not alter the legal proposition he cited. Id., 613, 614.

[9/] Canon 1 of the proposed Code of Conduct for Administrative Law Judges (Footnote Continued)

Complainant was paid an average of $1,496.63 per month plus $180.00 worth of benefits, for a monthly back wages figure of $1,676.63. $1,676.63 x 12 months = $20,119.56 per year + 365 = $55.12 per day. He was fired on 3 December 1990. He has earned $21,204.00 in mitigation income. His lost wages are thus correctly calculated as follows:

3 Dec. 90 through 2 Dec. 91	=	$20,119.56
3 Dec. 91 through 2 Dec. 92	=	20,119.56[10/]
3 Dec. 92 through 17 Aug. 93	=	+14,220.96
Total		$54,460.08

total lost wages	=	54,460.08
reduced by mitigation		-21,204.00
lost wages less mitigation	=	$33,256.08

Interest is 10% per year or

3 Dec. 90 through 2 Dec. 91	=	$ 3,325.61
3 Dec. 91 through 2 Dec. 92	=	3,325.61
3 Dec. 92 through 17 Aug. 93	=	+ 2,304.98[11/]
Total		$ 8,956.20

Total lost wages less mitigation plus interest	=	$42,212.28

I do not have the program that the attorney general's office uses for monthly compounding, and I have not checked the math in the exhibit to the Commission's Proposed Findings of Fact and Conclusions of Law because I can see from the outset that it is flawed (even if it were proper to use monthly compounding). It

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(Footnote Continued)
states that "An administrative law judge should uphold the independence and integrity of the administrative judiciary."

10/ 258 days x $55.12 per day, using the per diem method.

11/ 69.32% of a year x 3,325.61, using the percentage of a year method.

starts on 1 December 1990 and complainant was not fired until 3 December 1990; thus, all that follows is built upon a mathematically flawed foundation. Also, the table ends on 31 August 1993 and special damages can only properly be awarded through 17 August 1993, the date of this final order.

Perhaps, as an exercise in practical applications, the Commissioners will bring calculators and scratch pads to the meeting during which this case is reviewed and attempt to come up with a correct monthly compounded figure after correcting the problems I've pointed out in the preceding paragraph (in other words, after correcting the beginning date of complainant's accrual of damages to 3 December 1990 and the ending date to 17 August 1993). Or perhaps each may attempt to arrive at an appropriate figure prior to the meeting, just to see what ALJs would have to do to compound monthly (and, concomitantly, what circuit judges would have to do if the Supreme Court of Appeals were to require this approach).

I would estimate the complainant's incidental damages at approximately $10,000.00, but the lawful cap on such damages is $2,950.00; thus it is ORDERED that respondents pay complainant $2,950.00 in incidental damages.

The Commission has requested its costs, and they would be awarded if reasonable, but no statement of costs has been submitted, so no award of costs will be made.

Finally, respondents are ORDERED to cease and desist from engaging in unlawful discriminatory employment practices.

E.

CONCLUSION

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The respondents shall make payment in the amount of $45,162.00 to the complainant forthwith, but in no event later than 31 days from the date of entry of this order, plus front pay thereafter as previously ordered. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Legal Unit Manager, Glenda S. Gooden, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

Anyone adversely affected by this order may appeal as set out in Exhibit A.

WV HUMAN RIGHTS COMMISSION

ENTER: 17 August 1993

BY: _____
RICHARD M. RIFFE
ADMINISTRATIVE LAW JUDGE

EXHIBIT A

APPEAL TO THE COMMISSION

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing ADMINISTRATIVE LAW JUDGE'S FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 17th day of August, 1993, to the following:

Jeffrey R. Franczek
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BY CERTIFIED MAIL-RETURN RECEIPT REQUESTED

RICHARD M. RIFFE
ADMINISTRATIVE LAW JUDGE