STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 108A
Charleston, WV 25301-1400

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976
TOLL FREE: 1-888-676-5546

Cecil H. Underwood
Governor

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 5, 1998

Claude H. Whitlow, Jr.
903 Bridge Rd.
Charleston, WV 25314

City of Charleston
PO Box 2749
Charleston, WV 25330

John McFerrin
Assistant Attorney General
Civil Rights Division
PO Box 1789
Charleston, WV 25330

Julia K. Shreve
Assistant City Attorney
City of Charleston
PO Box 2749
Charleston, WV 25330

Re: Whitlow v. City of Charleston
EH-54-95

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge'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 judge, 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 administrative law judge shall not operate as a stay of the decision of the administrative law judge 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 administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, 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 an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge'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 an administrative law judge's final decision is not filed within thirty (30)

days of receipt of the same, the commission shall issue a final order affirming the judge'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."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Norman Lindell, Acting Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLAUDE H. WHITLOW, JR.,

Complainant,

v. DOCKET NUMBER: EH-54-95

CITY OF CHARLESTON,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on November 10, 1996, in Kanawha County, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received through February, 1997.

The complainant, Claude H. Whitlow, Jr., appeared in person. His case was presented by Stephanie C. Schulz, Assistant Attorney General, counsel for the West Virginia Human Rights Commission. The respondent, City of Charleston, appeared by counsel, Julia K. Shreve, Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence,

they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Claude H. Whitlow, Jr., began working for the respondent, the City of Charleston, West Virginia in its public works department in 1986.

2. The complainant has the following physical impairments: diabetes mellitus, asthmas, morbid/marked obesity, heart problems, hypertension and recurrent gout. These impairments substantially limit one or more of his major life activities.

3. The complainant began his employment as a part-time paint crew member in 1986. In 1987, he worked in respondent's parking system as a part-time cashier and part-time janitor. On April 1, 1988, the complainant became a full-time cashier in the parking system. While a cashier in the parking system, complainant was classified as a PG-3.

4. On June 18, 1991, Shawn Coffman, complainant's physician, wrote a note advising respondent as follows: "To whom it may concern, I am treating Mr. Whitlow for severe hypertension, diabetes

mellitus and asthma, excessive heat and dust can exacerbate his symptoms, and he would benefit from a job environment similar to his previous one as a cashier."

5. In 1992, Dr. Coffman moved his practice to Huntington and referred the complainant to Alberto Lee, M.D.

6. In 1991, the respondent transferred the complainant from the parking system to the refuse department located at the landfill in Kanawha City to work as a spotter and take tickets from the incoming trucks. He remained a PG-3. The complainant believed that he was being transferred to a better job.

7. At the landfill the respondent assigned complainant the duties of a spotter. These duties placed him outdoors where he was exposed to extreme heat. On July 27, 1991, after three days in the hot sun, he suffered heat stroke and passed out. As a result, the paramedics were called to his landfill job site.

8. After the fainting incident, the respondent built a spotter booth. The complainant worked in the booth for one day. Then, the respondent made the complainant an assistant to Christine Thompson, a supervisor at respondent's landfill.

9. At the landfill, the other PG-3 employees were truck drivers. However, complainant never served as a truck driver.

10. The complainant continued to work at the landfill and perform various duties for Ms. Thompson, including answering the telephones, answering customer complaints, performing office and clerical work, and serving as a dispatcher, night watchman and janitor.

11. The complainant accepted a voluntary demotion from a PG-3 to a PG-2, in order to open a truck driver slot. The voluntary demotion did not effect his pay.

12. At the landfill, respondent's employees in the PG-2 classification are "laborers." While complainant had the formal title of laborer, he never performed the duties of a laborer. Instead he continued to perform various office and clerical duties under the direction of Ms. Thompson.

13. In October 1993, the landfill came under private ownership and respondent immediately began moving its employees from Kanawha City to its central office. All of the respondent's refuse department employees, except the complainant, were either given jobs at the landfill under the new management or transferred to other permanent employment with the respondent.

14. In 1994, the complainant was transferred to the central office by respondent as a clerical worker. The respondent informed the complainant that this was not a permanent position. Consequently, he began bidding on other positions with the City.

15. While working at the refuse department on Pennsylvania Avenue, the complainant served as an office dispatcher, answered the telephones, performed clerical work, and performed janitorial work, light typing and general office work, similar to that performed at the landfill. At this time he was classified as a PG-2 "laborer."

16. In a statement received by the respondent on May 18, 1994, Dr. Lee opined, "To whom it may concern, Mr. Whitlow is markedly obese and has essential hypertension, recurrent gout and diabetes mellitus. He is not capable of performing outside work requiring

prolonged standing, walking, lifting, et cetera. He can only function in an office situation."

17. The complainant was laid off by respondent on or around July 15, 1994. At the time of his layoff the only medical evidence concerning complainant's disability reviewed by the respondent was Dr. Coffman's June 18, 1991, note and Dr. Lee's May 18, 1994, note. The respondent has never contacted Dr. Lee about the complainant's ability or asked for permission to contact Dr. Lee.

18. After the complainant was laid off, he was never recalled, despite the existence of vacant positions which complainant could perform for respondent with or without accommodation. Complainant bid on positions but was not selected.

19. Since Dr. Lee's first examination of complainant, his condition has improved. Furthermore, the complainant has lost at least 50 pounds.

20. On November, 20, 1996, at the public hearing in this matter, Dr. Lee testified that the complainant's disabilities would prevent him from serving as a parking garage cashier, only if he were required to shovel snow and walk two miles a day. According to Dr. Lee, the complainant could also perform the tasks required to keep the booth clean.

21. Dr. Lee also testified that the complainant can perform sedentary work, including a desk job, and further that he can sit without discomfort and perform the duties of a night watchman.

22. Dr. Lee did not know that complainant has asthma.

23. The complainant was born with asthma. According to the complainant, his asthma does not bother him. The complainant has never received treatment for his asthma and does not use an inhaler.

24. The complainant admits that he cannot engage in prolonged walking, heavy lifting or be exposed to extreme weather conditions.

25. According to the Department of Health and Human Services Social Security Administration, the complainant became disabled June 1, 1995. The complainant wants to work. The complainant is being encouraged to work by the Department of Health and Human Services Social Security Administration.

26. After the complainant's transfer from the refuse department's Kanawha City location to its Pennsylvania Avenue location, the respondent did not ask the complainant about his abilities and limitations. The complainant did not discuss his medical limitations or abilities during his interview for a parking system cashier position posted in October 1995.

27. The respondent alleges that it did not hire complainant for the cashier position posed in October 1995 because of his health and concern over his ability to perform the job.

28. According to Judith King, who is respondent's personnel director, she and the parking system director decided not to hire the complainant in October of 1995 based on Dr. Lee's medical notation in the complainant's personnel file because of concern for health and safety.

29. After laying off complainant, the respondent hired at least two individuals to serve as Ms. Thompson's assistant, the same position held by complainant.

30. The respondent referred to each of Ms. Thompson's subsequent assistants as part-time workers, otherwise known as IPTs. However, it is undisputed that these assistants worked 40 hours per week. The complainant testified that he would have accepted either part-time or temporary employment.

31. Mark Holstine, the respondent's public works director, testified at a public hearing that providing complainant with a reasonable accommodation would cause the respondent an undue financial hardship.

32. Ms. King also claimed that proving the complainant with reasonable accommodation would cause the respondent an undue financial hardship.

33. According to Ms. Thompson, the complainant received high marks as a punctual employee who did everything asked of him without complaint.

34. The respondent's performance reviews of the complainant in the years 1988, 1989, 1990 and 1992 rated the complainant's performance as satisfactory and above-average.

35. The complainant has two degrees. He earned an Associates Degree in Recreation and a Board of Regents Degree from West Virginia State College.

36. The respondent, through its agent Ms. King, interviewed the complainant for five positions the day before his civil service hearing.

37. Respondent failed to make meaningful efforts to assist the complainant in finding other employment with the City. Ms. Bonita Srnick, respondent's personnel director from 1991-1995, can only

recall attempting to find the complainant employment on the day before his civil service hearing.

38. The complainant credibly testified that the respondent's discriminatory actions caused him considerable emotional stress, humiliation and suffering.

39. During preparation for public hearing in this matter, respondent acquired information that it believes should limit its liability and complainant's remedy.

40. The 1986 employment application completed by the complainant for work with the city contains a statement of certification above the signature line whereby the applicant certifies that the applicant understands that any misrepresentation of facts included on the application shall be cause for rejection of said application or discharge after the applicant's employment.

41. The complainant did not respond to the following question contained on respondent's application: "Have you ever been convicted of a crime (exclude traffic violation)?"

42. The complainant did not answer this question yes or no, but left it blank.

43. At the time of his original application, the complainant had three felony convictions for drug possession: one in 1975; the second in 1976; and the third in 1985.

44. The complainant signed the signature line below the certification, verifying that he did not misrepresent any fact on the application.

45. Notwithstanding complainant's application omission, he was hired, and while working in various capacities performed satisfactorily.

46. In October of 1995, during complainant's re-interview for employment respondent's personnel director, Judith King, noticed complainant's earlier omitted response to the conviction question on complainant's 1986 employment application, but did not inquire further of complainant. According to Ms. King she was directed not to ask questions related to prior convictions.

47. Although Arthur Chestnut, respondent's present assistant director of the parking system, testified that he would try to get an employee dismissed if he learned the employee had not disclosed a conviction for a crime, Mr. Chestnut nor any other respondent's witness established any job relatedness for its articulated policy of not hiring employees with prior convictions.

48. The complainant presented unrebutted testimony that another employee who had a felony conviction was employed by respondent.

49. Respondent had no screening process and there is no evidence the respondent checked its applications of perspective applicants or employees to ascertain completeness or veracity.

50. There is no evidence that respondent ever discharged an employee for acts of omission or misrepresentation, minor or material, in completing respondent's application.

B.

DISCUSSION

A complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983). See Barefoot v. Sundale Nursing Home, 457 S.E.2d (1995). The McDonnell Douglas method requires that the complainant or commission first establish a prima facie case of discrimination.

A prima facie case of handicap discrimination requires the commission to show that (1) he or she meets the definition of "handicapped," (2) he or she is a "qualified handicapped person," and (3) he or she was discharged from his or her job. Morris Memorial Convalescent Nursing Home v. WV Human Rights Commission, 431 S.E.2d 353, 356 (1993). The prima facie case "is designed to allow a plaintiff with only minimal facts to smoke out a defendant--who is in control of most of the facts--and force it to come forward with some explanation for its action." Barefoot, 457 S.E.2d at 162.

The establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the complainant. Barefoot, 457 S.E.2d at 160; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, supra. The circumstantial evidence of a "link" was sufficient that "the burden then shifted to the

defendant...to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254.

If the respondent clearly articulates a legitimate, nondiscriminatory reason for rejecting the complainant, "then the complainant [or the commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, 309 S.E.2d at 352. The commission "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. See also O.J. White Transfer and Storage Co v. WV Human Rights Commission, 383 S.E.2d 323, 327 (1989). The question in this stage of the analysis is a question of fact. Barefoot, 457 S.E.2d at 164-164, n.19; St. Mary's Honor Center v. Hicks, 509 U.S.___, (1993).

In addition, if the evidence shows that the complainant's handicap was at least part of the motivation for the adverse action; that is, there was a mixture of motives and these impermissible motives were at least a factor, then the respondent can avoid liability only if it carries the burden of proving that it would have taken the same adverse action even if complainant's history and record of handicap had not been given any consideration. Barefoot, 457 S.E.2d at 162. Hopkins v. Price Waterhouse.

The Human Rights Act, as amended in 1981, prohibits discrimination on the basis of handicap. Employment discrimination on the basis of handicap is specifically barred by WV Code § 5-11-9(a).

An aggrieved person must prove that her or she is a qualified handicapped person within the meaning of the West Virginia Human Rights Act and West Virginia Human Rights Commission Legislative Rules Regarding Discrimination Against Individuals with Disabilities, 6 WV CSR §§77-1-1 et. seq. This initial burden of proof has most frequently been interpreted by courts to require the complainant in a failure to hire case to prove:

> (1) he or she is handicapped;
>
> (2) he or she is qualified to perform the job despite the handicap; and
>
> (3) he or she was excluded because of the handicap.

See, e.g., Doe v. New York University, 666 F.2d 761, 776 (2nd Cir. 1981; Puskkin v. Board of Regents, 658 F.2d 1372, 1387 (10th Cir. 1981); Treadwell v Alexander, 707 F.2d 473, 475 (11th Cir. 1983).

There can be no question that the complainant, Claude Whitlow, established a prima facie case. The parties have stipulated that the complainant is handicapped within the meaning of the statute. It is further undisputed that respondent laid him off on or around July 15, 1994 and that respondent has not recalled the complainant. The overwhelming weight of medical testimony indicates that the complainant was physically capable of performing many jobs for respondent, Moreover, complainant's own work experiences with

respondent both before and after 1994 reveals that he was able to perform the jobs of parking garage cashier or office worker.

Complainant began his full-time employment with the city as a parking system cashier PG-3. According to respondent's posting of July 28, 1993, the qualifications of a parking system cashier are: "Dependable individual with math skills. Must be available to work variable shifts with variable days off. Must be physically able to enter and work in and ext the cashiers (sic) booth in the parking garages." The October 1995 posting for the position listed the qualifications as:

> Collect money from customers. Responsible for their money bank and have experience in dealing with the public. Also have good phone manners and know how to give back proper change. Maintain a clean cashier booth and do minor clean up. Needs experience in cashier or clerical duties. Also needs a high school diploma or GED.

The complainant's on-the-job experience alone makes him qualified for the position of PG-3 cashier. He held this position from 1988 to 1991. In the years 1988, 1989 and 1990, the respondent's performance reviews of the complainant rated his performance as satisfactory and above average.

The complainant's educational background far exceeds the minimum requirements contained in the posting. Complainant has two advanced degrees, whereas the qualifications for cashier only require a GED or high school diploma. In addition, his ability is well demonstrated by the numerous duties he performed during his nearly eight years with the city. During the course of his employment with the respondent, complainant served as a cashier, janitor, paint crew member, dispatcher, night watchman and performed various clerical

work He served longest as a cashier in the respondent's parking system. Every position held by complainant as a full-time employee required "people skills" as contained in the posting. Every performance rating of complainant of record demonstrates that the respondent itself judged his work efforts as acceptable at a minimum and at best above average.

The complainant's abilities were recognized not only in his performance reviews, but also by the testimony of his supervisor, Christine Thompson. Ms. Thompson was complainant's last direct supervisor. Ms. Thompson credibly testified to complainant's excellent work ethic and abilities. Although respondent's former personnel director, Bonita Srnick, testified that that complainant's performance was not acceptable, she also testified that she never visited field locations such as the landfill nor did she have any reliable recollection of the events surrounding the complainant's employment. Ms. Srnick's testimony is accordingly not credited.

Respondent further maintains that the complainant could not perform the duties of parking cashier because the length and width of the booths the cashiers worked from were too small for his size and girth. Not only is this contention credibly contradicted by the complainant who testified he had not problem, but the medical evidence reveals that the complainant lost considerable weight since the last time he held the cashier's position. Another duty of a cashier is to perform the light janitorial duties involved in keeping the booth clean. Dr. Lee also testified that complainant's disabilities do not prevent him from performing the janitorial duties associated with cleaning the booth.

The evidence supports a finding that complainant is able and competent to perform the essential functions of a PG-3 parking system cashier with or without reasonable accommodation. The complainant has established that he is a qualified handicapped person.

A qualified handicapped person with a disability is an individual "able and competent, with reasonable accommodation, to perform the essential functions of the job in questions." WV Code §5-11-9(a); West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities, 6 WV C.S.R. §77-1-4.2 (1984). The Human Rights Commission's legislative rules further state that:

> "Able and competent" means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat of injury to the health and safety of either other employees or the public.
>
> Rules Regarding Discrimination Against the Handicapped, 6 WV C.S.R. § 77-1-4.3 (1994).

Reasonable accommodation is defined as reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in the position for which he was hired. 6 WV § 77-1-4.4 (1994).

In Skaggs v. Elk Run Coal Co., 479 S.E.2d 561 (1996), the West Virginia Supreme court set forth the elements required to state a claim for a breach of the duty of reasonable accommodation. A complainant may prove that (emphasis added):

> (1) S/he is a qualified person with a disability;
> (2) the employer was aware of the plaintiff's disability;

(3) S/he required an accommodation in order to perform the essential functions of the job;
(4) A reasonable accommodation existed that would meet the his/her needs;
(5) The employer knew or should have known of the employee's needs and of the accommodation; and
(6) The employer failed to provide the accommodation.

By proving that the complainant is a qualified handicapped person with a disability, the commission has made its prima facie case under the McDonnell Douglas inferential proof formula and met the first burden of the Skaggs analysis.

To comply with the Human Rights Act, an employer must make reasonable accommodations for known impairments to permit an employee to perform the essential functions of the job. Skaggs, slip op. at 17. The respondent's knowledge of complainant's disability at all relevant times is undisputed. First, both former personnel director Bonnie Srnick and present personnel director Judith King acknowledged complainant's disabilities. Second, the respondent circulated a memorandum among City personnel noting complainant's disability. Third, the complainant's last supervisor, Ms. Thompson testified that she knew of his disability after he passed out at the landfill. Finally, the parties stipulated that the complainant is disabled. Accordingly, the second step of the Skaggs analysis is established.

The third step of the Skaggs analysis provides that the complainant may prove that he required an accommodation in order to perform the essential functions of the job. Complainant's need for reasonable accommodation began only after he collapsed at the respondent's landfill. Complainant presented the respondent with two doctor's notes, one from Dr. Coffman and another from Dr. Lee.

On June 18, 1991, Dr. Coffman recommended that the complainant be returned to a position similar to his former employment as a parking system cashier. On May 18, 1994, Dr. Lee concluded that complainant was not capable of performing outside work requiring prolonged standing, walking and lifting, and moreover, that the complainant could only function in an office situation. Therefore, the complainant required an accommodation in order to perform the essential functions of the job.

The only medical evidence examined by the respondent is the medical notations of Dr. Lee and Dr. Coffman. The respondent had at least two physicians' notes in the complainant's personnel file. It knew or at least should have known of complainant's need for accommodation. Therefore, the complainant met the fifth burden of Skaggs.

The duty to reasonably accommodate is an affirmative obligation on the employer, designed to "cure the social maladies of intentional and unnecessary denials of job opportunities to persons with disabilities." Skaggs, slip. op. at 13. More specifically:

> Reasonable accommodations include, but are not limited to:
>
> 4.5.1. Making facilities used by individuals with disabilities, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by individuals with disabilities;
>
> 4.5.2 Job restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent (as defined in Rule 4.3) to perform, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions;...

West Virginia Human Rights Commission' Legislative Rules Regarding Discrimination Against Individuals With Disabilities, 6 WV C.S.R. § 77-1-4.5. (1994).

"The term 'reasonable accommodation' is an open-ended one." Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Ore. 1994).

Reasonable accommodation can include reassignment to a vacant position. Skaggs, slip. op. at 27. Further, the Court in Skaggs held, "More importantly, whether an accommodation is labeled as an adjustment to job duties or as the creation of a new position (unique to the plaintiff) is completely irrelevant to determining whether an employer met its duty of accommodation." Id, at 28.

Step four of Skaggs, states that a reasonable accommodation must exist. The employer could have reasonably accommodated complainant both before and after his layoff. However, the respondent made no serious attempts to accommodate complainant.

Before his layoff, complainant was a PG-3 cashier. After his collapse, he performed various duties under the direction of Ms. Thompson. There is no empirical evidence that complainant could not have performed the duties of a cashier, dispatcher, night watchman and various clerical work.

Complainant bid on positions but was not selected. Before his layoff, the respondent could have transferred complainant to a position he was able and competent to perform. Cashier positions were posted and Ms. Thompson still needed assistance.

After his layoff, the respondent had vacancies in jobs which complainant was both able and competent to perform. Cashier positions were posted, and since complainant's departure, the respondent hired at least two assistants for Ms. Thompson. Numerous

secretarial and clerical position s were also available after his layoff. In spite of the complainant's experience and record of performing various tasks with the City, the City could not find him employment. In spite of the complainant's abilities, years of service, and education, the respondent continued to post vacancies for jobs for which he was qualified.

The employer, the City of Charleston, failed to provide complainant reasonable accommodation as set forth in step six of the Skaggs analysis. Reasonable accommodation includes reassignment to a vacant position. See Skaggs, slip op. at 18; Americans With Disabilities Act, §101(9)(B), 42 U.S.C §12111(9)(B); see also 29 C.F.R. §1630.2(o)(2)(ii) (1995). Reasonable accommodation also includes job restructuring, part-time or modified work schedules. West Virginia human Rights Commission's Legislative Rules Regarding Discrimination against Individuals With Disabilities, 6 WV C.S.R. §77-1-4.5. (1994). "'Accommodation' implies flexibility, and workplace rules, classifications, schedules, etc., must be made supple enough to meet that policy." Skaggs, slip op. at 21 (footnote omitted).

Although Ms. King's testimony reveals that the complainant's health was a concern of the respondent, the respondent never took affirmative steps to enter into a meaningful dialogue regarding potential accommodations for complainant. the respondent never took affirmative steps to understand the nature and extent of the complainant's disabilities. Specifically, after the complainant collapsed at the landfill, the respondent did not ask the complainant about his abilities and limitations. After the complainant's

transfer from the Refuse Department's Kanawha City location to its Pennsylvania Avenue location, the respondent did not ask the complainant about his abilities and limitations. According to Ms. King, the respondent never even asked the complainant for permission to talk to his physician and never spoke with any of complainant's physicians. Respondent has presented no compelling reason as to why it could not accommodate the complainant, a qualified handicapped person.

Respondent, City of Charleston, next argues that the complainant should not be permitted to assert that he is a qualified handicapped individual during the same time period in which he applied for disability benefits with the Social Security Administration. However, the existence of complainant's application for disability benefits does not estop him from asserting that he is a qualified person within the meaning of the Human Rights Act. In Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, (N.D. Ill. 1994); Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992). Support for this conclusion is found in a number of federal court rulings which hold that a decision by the Social Security Administration "to award benefits is not synonymous with a determination that a plaintiff is not a 'qualified individual' under the ADA." Dovenmuehle Mortgage, 859 F. Supp. at 1140, citing Overton v. Reilly, supra. In these cases, the defendants argued, as the respondent does here that a plaintiff's representation of total disability on a benefits application precluded him from asserting that he was a qualified individual with a disability.

The Social Security Act defines "disability" as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of less than 12 months." 42 U.S.C. §423(d)(1)(A). Under the statute, a person is entitled to disability benefits only if his impairments are:

> of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of gainful work which exists in the national economy..."[W]ork which exists in the national economy" means work which exists in significant numbers, either in the region where the individual lives or in several regions of the country.
>
> 42 U.S.C. §423(d)(2)(A)

However, the statute clearly permits individuals to receive benefits while engaged in a period of paid "trial work." 42 U.S.C. §422(c).

The complainant's inability to work for the purposes of Social Security disability benefits is not inconsistent with his claim of being capable of performing the essential functions of the job from which he was permanently laid off. The ADA's requirement that an employer make a reasonable accommodation requires that an employer consider modifying it s existing job descriptions to create a job suitable for a particular disabled employee. See 42 U.S.C. §12111(9). Because specially tailored jobs may not currently exist in substantial numbers in the labor market, a person with a disability who could perform the essential functions of a job would nevertheless be unable to engage in gainful work and thus be disabled with the Social Security Act.

The "trial work" provision of the Social Security Act serves to encourage disabled individuals to engage in remunerative employment because it permits them to receive benefits while working. See 42 U.S.C. §422(c). This goal of the Social Security Act which is rehabilitative is not inconsistent with the mandate of the West Virginia Human Rights Act, which is to insure that equal opportunity in the employment setting is afforded to a person such as the complainant who has demonstrated that he can perform the essential elements of the job with or without accommodations.

The respondent's argument fails because the complainant has established that a person may be disabled for the purposes of receiving Social Security disability benefits, but still be a qualified handicap person under West Virginia Human Rights Act.

Finally, it is the position of respondent that it has acquired evidence that the complainant misrepresented facts on his employment application at the time he was hired in 1986 which should preclude the complainant from being given relief, particularly reinstatement.

The 1986 employment application completed by the complainant contains a statement of certification above the signature line whereby the applicant certifies that the applicant understands that any misrepresentation of facts included in the application is cause for rejection of said application or discharge after the applicant's employment.

The application asks the question,"Have you ever been convicted of a crime (excluded traffic violations)? If yes, explain giving dates:___." The complainant did not answer this question yes or or no, but left it blank.

The complainant signed the signature line below the certification, verifying that he did not misrepresent any fact on the application.

During the course of preparation for hearing in this matter, respondent learned that the complainant had felony convictions in 1975, 1976 and 1985 for drug possession. Respondent maintains that had it known of complainant's misrepresentation by omission, that respondent would have discharged the complainant on this basis alone. Moreover, that complainant would not have been hired as a city employee because he would have been considered a business risk.

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), the Supreme Court, resolving a split in the circuits over whether employers can use after acquired evidence to defeat discrimination claims, ruled unanimously that evidence of employee wrong doing acquired after the employment decision was taken, can never preclude a finding of liability but can be taken into account in determining remedy. The Court stated:

> Where an employer seeks to rely upon after acquired evidence of wrongdoing, it must first establish that the wrong doing was of such severity that the employee in fact would have been terminated on that grounds alone....

The Court emphasized that the employer must establish not only that it could have fired the employee for the later discovered misconduct but that it would, in fact, have done so. The ongoing focus on the employers actual employment practices recognizes that employees "often say that they will discharge employees for certain misconducts while in practice they do not."

Since McKennon, appellate courts almost uniformly have established that the employer asserting an after acquired evidence defense has the burden of persuasion of proof by a preponderance of the evidence that it would have fired the employee. Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160 (6th Cir. 1996); O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996); and Rickey v. Mapco, Inc., 50 F.3d 874 (10th Cir. 1995).

Here, the respondent's evidence does not reveal that the complainant was ever questioned about his omitted responses related to any prior convictions. To the contrary, the evidence reveals that respondent's personnel director did not question the complainant about his prior conviction during his re-interview in 1995, although she noticed the omission. Moreover, Arthur Chestnut, the acting assistant director of the parking system testified that he reviewed only some of the applications of employees under his direction, and significantly had not found it necessary to check their responses to the respondent's prior conviction question. By its inaction, the respondent has demonstrated the lack of importance it placed on the question complainant did not answer or, more generally, on answers provided by any applicants. By failing to actively pursue information omitted, particularly information concerning prior convictions, the respondent cannot credibly assert after the fact that complainant's omission was material or his alleged misrepresentation was of such a severity that he would have been terminated on those grounds alone. Interestingly, the complainant presented unrebutted testimony that another employee who had a felony conviction was in respondent's workforce.

In addition, respondent did not provide any proof, much less a preponderance of evidence, that it had ever rejected an applicant or terminated an employee for alleged misrepresentation, respondent's application disclaimer notwithstanding. To be sure, respondent's lack of scrutiny of its applications belies its credibility on the importance of full disclosure. Finally, respondent has not established the materiality of complainant's act of omission as it related to the position complainant sought and others he held while employed by the city in a competent and able manner. Respondent's proof is clearly insufficient to support its defense of after acquired evidence. The complainant is entitled to his full make-whole remedy under the West Virginia Human Rights Act.

C.

CONCLUSIONS OF LAW

1. The complainant, Claude H. Whitlow, Jr., is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10. At all times relevant, the complainant has been a person within the meaning of the WV Code §5-11-3(a).

2. The respondent, the City of Charleston, employs the requisite number of employees, and as such, is an employer as defined by WV Human Rights Act, Code §5-11-3(d). The respondent, therefore, is subject to the provisions of the West Virginia Human Rights Act. The respondent is also a person within the meaning of WV Code §5-11-3(a).

3. The complaint in this matter was timely filed in accordance with WV Code §5-11-10.

4. The complainant is a handicapped person as defined by WV Code §5-11-3(m), in that he has a physical impairment which substantially limits one or more major life functions, as well as a record of such handicap.

5. The commission established by a preponderance of the evidence that before the complainant's layoff by the respondent he was a qualified handicapped person and possessed the skills and ability to do the desired job, with reasonable accommodation.

6. The commission established by a preponderance of the evidence that after the complainant's layoff by the respondent he remained a qualified handicapped person and possessed the skills and ability to do the desired job, with reasonable accommodation.

7. The commission established by a preponderance of the evidence that the respondent failed to provide the complainant a reasonable accommodation, i.e., enter into a meaningful dialogue with him and his physician and consider him for positions which he was qualified, including the available parking system cashier positions.

8. The respondent failed to meet its burden in proving that the reasonable accommodation requested by the complainant created an undue hardship upon the respondent.

9. The respondent has failed to prove that after acquired evidence of the complainant's felony convictions and any misrepresentation thereof of his application for employment are of such severity that any relief to the complainant is barred.

10. The commission has proven by a preponderance of the evidence that the respondent laid the complainant off because of his disability, in violation of the West Virginia Human Rights Act.

11. As a result of the alleged discriminatory actions of the respondent, the complainant is entitled to the following relief:

(a) Back pay and benefits, plus prejudgment interest thereon at the rate of ten percent (10%) per annum, compounded monthly from July 15, 1994, through November of 1997, in the amount of $90,038.90, as more fully set forth in the parties' stipulations and the Commission's Exhibit A with attached notes.

(b) Reinstatement to the next available permanent full-time position for which he is qualified and front pay until so reinstated by the respondent;

(c) Incidental damages in the amount of $3.277.45 for the humiliation, embarrassment and emotional distress suffered by the complainant as a result of the discriminatory actions of the respondent;

(d) A cease and desist order aimed at preventing the respondent from continuing the illegal discriminatory practices evidenced in its actions; and

(e) Reimbursement of the litigation costs in the amount of $309.50 incurred by the commission in prosecuting this claim.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant $90,038.90 as backpay, prejudgment interest and benefits.

3. Within 31 days of receipt of this decision, the respondent shall pay to the commission $309.50 as reimbursement for its cost in prosecuting this claim.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. 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, Norman Lindell, Acting Executive Director, Room 108A, 1321 Plaza

East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616 extension 206.

It is so **ORDERED**.

Entered this 5th day of August, 1998.

WV HUMAN RIGHTS COMMISSION

BY: _____
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE