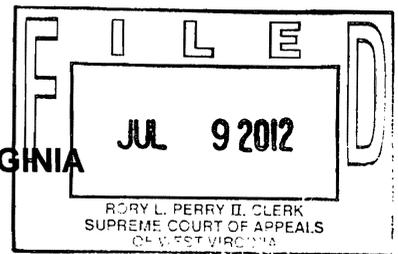


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-0678



STATE OF WEST VIRGINIA
ex rel. TEN SOUTH MANAGEMENT
COMPANY, LLC, doing business
as VISTA VIEW,

Petitioner,

v.

ORIGINAL JURISDICTION
MANDAMUS

HONORABLE ROBERT B. WILSON,
Acting Chief Administrative Law Judge
of the West Virginia Human Rights
Commission, and MONICA ROBINSON,

Respondents.

RESPONSE OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
TO PETITION FOR WRIT OF MANDAMUS
WITH ORAL ARGUMENT REQUESTED

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

PAUL R. SHERIDAN
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
208 Capitol Street, 3rd Floor
Post Office Box 1789
Charleston, West Virginia 25326-1789
(304) 558-0546; Prs@wvago.gov
Counsel for the West Virginia
Human Rights Commission
WV State Bar ID No. 3373

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QUESTIONS PRESENTED

1. Whether the ALJ exceeded his authority or abused his discretion by declining to dismiss this contested case, where the West Virginia Human Rights Commission made a Probable Cause Determination after conducting a No Probable Cause Review, and where that No Probable Cause Review had been requested by the Complainant in the manner directed by the WVHRC.

2. Whether the ALJ exceeded his authority or abused his discretion by declining to compel the West Virginia Human Rights Commission to issue a written order with detailed findings as to the West Virginia Human Rights Commission's Probable Cause Determination, where the Petitioner is on notice of the Complainant's claims against it, and where the Petitioner has the right to discover the evidence against it before proceeding to hearing.

3. Whether the ALJ exceeded his authority or abused his discretion by declining to disqualify counsel for the West Virginia Human Rights Commission from representing the agency in a contested case which seeks to protect and vindicate the human rights of Monica Robinson, where that counsel participated and advised the agency during the investigation of the matter.

STATEMENT OF THE CASE

The underlying administrative matter which is the subject of Petitioner's writ was initiated by Complaint and Amended Complaint filed at the West Virginia Human Rights Commission [hereinafter WVHRC or Commission] by the Complainant, Monica Robinson [hereinafter Robinson or Complainant], against Ten South Management Company, LLC, Petitioner before this Court [hereafter Petitioner or Ten South]. The Complaint alleged race discrimination in the termination of her employment with Ten South.

The WVHRC has a process for investigating and "determining" claims of discrimination. This process, established by statute, West Virginia Code § 5-11-10, is undertaken by the WVHRC in its executive capacity, under the supervision of the Executive Director, and sometimes employing counsel for advice and other legal services. W. Va. Code §§ 5-11-7; 5-11-10. By making a "determination" of Probable Cause or No Probable Cause, the Executive Director decides whether or not the WVHRC will permit the

complainant access to an administrative adjudication of the complaint. Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 173, 324 S.E.2d 99, 110-111 (1984). In cases found to have probable cause, the WVHRC has a procedure for the adjudication of the contested case. The adjudication process is administered by the WVHRC's administrative law judges, who are independent of the Executive Director. Where there has been a determination of probable cause by the Executive Director, pursuant to statute, the agency (in its executive capacity) advocates for the complainant. The WVHRC and the interests of the complainant are represented in the administrative adjudication by the agency's counsel.¹

Pursuant to its process, the WVHRC served Robinson's Complaint on Ten South, which denied the allegations of discrimination. The WVHRC then investigated the Complainant's allegations of discrimination, and on June 10, 2011, issued an initial Determination of No Probable Cause [hereinafter NPC Determination]. On June 10, 2011, the WVHRC sent a copy of the NPC Determination letter by certified mail to Complainant's last known address. A copy of the same letter was also sent to Ten South on June 10, 2011. This letter advised the Complainant, in bold text, that she had 10 days from the date of receipt of this letter to request in writing a review and reconsideration of the Determination. See Appendix to Writ of Mandamus, pp. 00004-00005.

The certified letter to the Complainant was never received by the Complainant, and was later returned to the WVHRC by the Postal Service unopened. Respondents' Supplemental Appendix, p. 2. While it is not clear, there may have been a copy of the same NPC Determination letter mailed to the Complainant by first class mail. Whether the Complainant received this alternative notice, and if so when she received it, are uncertain.

On June 24, 2011, the Complainant went to the offices of the WVHRC.² While at the WVHRC offices on that day, the Complainant wrote out a one-page request for a review, which she left with the clerk at the WVHRC. Later that same day, Complainant

¹"The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents." W. Va. Code § 5-11-10.

²It is not clear whether the Complainant knew of the NPC Determination before her visit to the WVHRC.

went back to the WVHRC and wrote out a longer, more detailed, two-page document in support of her request for review, and left it with the clerk at the offices of the WVHRC. Both documents were dated. Appendix to Writ of Mandamus, pp. 00007-00009. Among other things, Robinson, who acted *pro se*, pointed out: (1) that in terminating her for alleged "certification issues," Ten South had failed to follow its own human resources and evaluation policies and procedures; (2) that similarly situated white employees who were not terminated had been having similar "certification issues;" and (3) that the supervisor who had terminated Robinson was also responsible (and under pressure by Ten South) for related performance problems.³

On June 27, 2011, the WVHRC mailed a copy of the Complainant's request for review to Ten South, and Ten South was advised by cover letter that, pursuant to Rule 77-2-4.14.b. of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, W. Va. Code R. § 77-2-1 et seq. (1999), it had "ten (10) working business days" from the date of receipt to file a response. Respondents' Supplemental Appendix, pp. 3-4. Ten South never filed a response to the Complainant's request for review.

On July 29, 2011, having received no response to Complainant's request from Ten South, Acting Executive Director Phyllis H. Carter granted the Complainant's request for a review.⁴ On August 15, 2011, a Notice of Administrative Review of the No Probable Cause Finding was mailed to Robinson and Ten South, setting the Review for September 7, 2011. Appendix to Writ of Mandamus, pp. 000010-000012.

On September 7, 2011, a meeting was held in connection with the NPC Determination. At the request of the Executive Director, the meeting was convened by Commission's counsel, Deputy Attorney General Paul R. Sheridan.⁵ The Complainant

³This supervisor was subsequently terminated by Ten South for reasons which have been withheld from the WVHRC and are the subject of continuing discovery efforts.

⁴This is the WVHRC action which Petitioner now claims "was improper and violative of West Virginia Code § 5-11-10." Petition for Writ of Mandamus With Oral Argument Requested, p. 6.

⁵The nature of Sheridan's participation, that is, as counsel for the agency acting on behalf of the Director, was made clear to the parties. Appendix to Writ of Mandamus, p. 00010.

attended in person and without counsel. Ten South attended by its local manager, Jackie Szasz-Sowards, and by counsel, David J. Mincer. At the meeting, there was a discussion about the Complainant's employment and termination and her allegations of unlawful discrimination. As this was an informal meeting, there were no witnesses examined and no formal record made. Commission's counsel subsequently provided the agency with legal advice about its determination of Robinson's Complaint.

On October 19, 2011, Acting Executive Director Phyllis H. Carter wrote to the Complainant, with a copy to Ten South, giving notice that she was reversing the original No Probable Cause Determination and was issuing a determination of Probable Cause in this case. See Appendix to Writ of Mandamus, pp. 00013-00015.⁶ The implication of this PC determination was that the matter would now proceed to the adjudicatory phase, and that the WVHRC would furnish Ms. Robinson legal representation in prosecuting her race discrimination claim.⁷

On October 19, 2011, the matter having been assigned to Acting Chief Administrative Law Judge Robert Wilson for adjudication, a Notice of Public Hearing, Order, Mediation and Settlement Directives was issued and mailed to the parties. Attached was a copy of the Complainant's Amended Complaint. Appendix to Writ of Mandamus, pp. 00016-00024.

On October 31, 2011, pursuant to the directive of the Administrative Law Judge in the Notice of Public Hearing, Ten South filed a formal Answer to the Amended Complaint. See Appendix to Writ of Mandamus, pp. 00027-00035. The Answer objected to the issuance of a probable cause determination with "no explanation as to the basis for the Commission's reversing its prior ruling." Appendix to Writ of Mandamus, p. 00033. Nothing

⁶Petitioner's second alleged ground for a writ is the lack of specific findings in this determination "sufficient to allow judicial review of the decision to reverse the original determination of No Probable Cause." Petition for Writ of Mandamus With Oral Argument Requested, p. 7.

⁷This was fulfillment of the WVHRC's duty to discern between cases which are legitimate and those which should be dismissed without adjudication, a duty which this Court has likened to "the gatekeeping function performed by private attorneys who, prior to filing civil actions in the appropriate forums, determine the validity of the complaints advance by potential litigants." Allen, 174 W. Va. at 173, 324 S.E.2d at 110-111.

in the Answer spoke to any alleged untimeliness problem with the Complainant's request for a review.

The Answer also objected, after-the-fact, to Sheridan's participation in the NPC Review. The Answer asserts that "Deputy Attorney General Paul Sheridan, who is not a disinterested, fair and impartial party, apparently made a determination that the full, fair and impartial investigation yielded the wrong results." Appendix to Writ of Mandamus, p. 00033. At the time, Ten South's objection to Sheridan related backward and not forward. Although the Answer makes it clear that Sheridan's participation in the upcoming litigation was anticipated, nothing in the Answer suggested that Ten South believed Sheridan to be disqualified from participating in the upcoming contested case on behalf of the WVHRC.⁸ On the same date, Deputy Attorney General Paul Sheridan, Commission's counsel, filed a Notice of Appearance on behalf of the WVHRC. See Appendix to Writ of Mandamus, pp. 00025-00026.

Discovery in the contested case commenced with the issuance of the Notice of Public Hearing, and was originally scheduled to be completed on March 3, 2012. The Commission served discovery requests upon Ten South on January 13, 2012. Ten South originally filed discovery on March 4, 2012, after the discovery period had already ended.⁹

On February 10, 2012, a telephonic conference was convened by the ALJ for the purpose of discussing discovery. During the teleconference, more than three months after the filing of its formal Answer and more than five months after the NPC Review, counsel for Ten South orally raised for the first time the issue of timeliness of Complainant's request for an NPC Review. During the teleconference, the ALJ explained that he considered objections related to the issuance of the PC determination to be outside his purview.

⁸Mr. Sheridan's continued involvement in this case is now the third cause cited by Petitioner in seeking a writ.

⁹The discovery period was subsequently extended at the request of the WVHRC, and Ten South re-served its discovery.

On March 29, 2012, in the midst of a subsequent discovery dispute,¹⁰ Ten South filed four Motions: a Motion to Issue Subpoena Duces Tecum; a Motion to Disqualify Attorney Paul Sheridan; a Motion to Dismiss Complainant's Request for Reconsideration; and a Motion To Stay. Appendix to Writ of Mandamus, pp. 00036-00041, 00054-00065. Ten South later responded to the Commission's Motion to Compel, and the Commission responded to each of Ten South's Motions. Appendix to Writ of Mandamus, pp. 00066-00071; Respondents' Supplemental Appendix, pp. 5-31.

On April 6, 2012, the Administrative Law Judge issued an *Order Compelling Parties to Respond to Discovery, Denying Respondent's Motion to Stay, Denying Respondent's Motion to Dismiss Complainants Request for Reconsideration, Denying Respondent's Motion to Issue Subpoena Duces Tecum, and Denying Respondent's Motion to Disqualify Paul Sheridan as Counsel for Complainant*. See Appendix to Writ of Mandamus, pp. 00042-00052. In his *Order*, the ALJ declined to grant the Motion to Dismiss and the Motion for Subpoena Duces Tecum, ruling that he lacked authority to conduct a further reconsideration of the issue of Probable Cause or No Probable Cause. Appendix to Writ of Mandamus, p. 00045. The ALJ also declined to disqualify Sheridan as counsel for the WVHRC. The ALJ noted that Ten South had not objected to Sheridan's role as counsel in this proceeding in its Answer, but rather only to "his role as the person conducting the NPC Review Hearing." Appendix to Writ of Mandamus, p. 00047. The ALJ further concluded that Ten South had articulated no basis for claiming it was prejudiced by Sheridan's participation as counsel for the WVHRC.

On or about June 1, 2012, Ten South filed this Petition for Writ of Mandamus. The Petitioner seeks to have this Court direct the ALJ to dismiss Robinson's case without getting to the merits, because of her allegedly untimely request for review back in June 2011. In the alternative, Petitioner asks the Court to order the WVHRC to issue findings

¹⁰On March 28, 2012, the Commission, by its counsel, filed a Motion to Compel, seeking written responses to discovery which had been served many months before.

of fact and conclusions of law to explain its Probable Cause Determination, and to hold that Deputy Attorney General Sheridan is disqualified to represent Robinson in the matter.¹¹

SUMMARY OF ARGUMENT

Petitioner's central claim is that Robinson's discrimination Complaint must be dismissed, without consideration of the merits, because she allegedly missed a deadline in requesting a review during the investigation. This argument fails: (a) because, by any reasonable application of the rules regarding timing, Robinson's request was not clearly late; and (b) because Petitioner failed to timely raise its objection and so waived it.

Petitioner's second claim is that the WVHRC may not change its No Probable Cause Determination of Robinson's Complaint to a Probable Cause Determination without issuing an order with findings of fact and conclusions of law. In making this claim, Petitioner mischaracterizes the NPC Review as an *adjudication*, ignoring the statutes, rules, and case law, which make it clear that it is actually preliminary to an adjudication. Despite knowing the charges against it, and having the opportunity to defend against those charges, Petitioner wants this Court to "review the review," and asks this Court to treat this Probable Cause Determination as an adjudication requiring the WVHRC to issue the kind of detailed order appropriate for an adjudication. Petitioner would have this Court treat every decision by an agency as if it were an adjudication. The ALJ properly ruled that the NPC Review was not an adjudication which would give rise to a reviewable order.

Petitioner's third claim also grows from Petitioner's mischaracterization of the NPC as an *adjudication*. Petitioner asserts that the involvement of the Commission's counsel in the NPC Review was not as an advisor to the Executive Director, but rather as a judge. Petitioner argues that since it would be improper for the same person to act as both judge and lawyer in the same case, Commission's counsel should be disqualified. Despite no articulation by Petitioner of real conflict of interest or real prejudice, Petitioner seeks to

¹¹The Petitioner mistakenly refers to Sheridan as serving as counsel for Robinson, when he actually serves as counsel to the WVHRC and in that capacity presents Robinson's case on behalf of the agency, pursuant to W. Va. Code § 5-11-10.

disrupt the proceedings below by prohibiting continued involvement by the Commission's counsel, who assisted the Executive Director in making the Probable Cause decision. The ALJ properly recognized that the role of Commission's counsel in this case was never that of a judge, but consistently that of advisor to and advocate for the agency.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the Revised Rules of Appellate Procedure, oral argument in this matter is unnecessary. The issues raised here involve the application of well settled principles of law and agency practice, which justly and appropriately answer the questions presented.¹²

ARGUMENT

A. AN EXTRAORDINARY WRIT WILL NOT LIE IN THIS CASE.

Petitioner has styled this action as a Petition for Writ of Mandamus. "Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." State ex rel. Allstate Insurance Co. v. Union Public Service District, Syl. pt. 1, 151 W. Va. 207, 151 SE 2d 102 (1966). However, there is a very high standard for awarding a writ.

"A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy."

Syl. pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969); quoted in State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009).

As Petitioner has noted, Petition for Writ of Mandamus With Oral Argument Requested, pp. 12-13, it is Petitioner's burden to establish all of the elements, and a writ will fail for lack

¹²The WVHRC notes that the relief requested by the Petitioner could require a significant departure from long settled precedent and long practiced agency procedures, and could significantly alter the fundamental activities of the WVHRC and how it utilizes legal services. The WVHRC would urge the Court not to take this path in this case without granting oral argument.

of any element. State ex rel. Kucera v. City of Wheeling, Syl. pt. 2, 153 W. Va 538, 170 S.E.2d 367 (1969).

Since mandamus is typically used to compel ministerial action, mandamus against a judicial official, who is typically exercising discretion in the application of law to facts, is even less common. "Mandamus against a judge is a drastic and extraordinary remedy . . . reserved for [a] really extraordinary cause[]." State ex rel. Ball v. Cummings, 208 W. Va 393, 540 S.E. 2d 917 (1999), citing State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996). Mandamus will lie to compel a court or quasi judicial tribunal to exercise lawful jurisdiction where it refuses to do so. Staton v. Hrko, 180 W. Va. 654, 379 S.E.2d 159 (1989); 55 C.J.S., Mandamus, § 93. However, mandamus does not ordinarily lie to direct the manner in which a tribunal is to exercise its discretion.

Occasionally, where appropriate, this Court has treated a request for a writ of mandamus as a writ of prohibition, State ex rel. Riley v. Rudloff, 212 W. Va. 767, 700 n.1, 575 S.E.2d 377, 390 n.1 (2002), and has issued a writ of prohibition against a judge or tribunal if it has found that the judge or tribunal has exceeded its legitimate power or acts in excess of its jurisdiction. Williams v. Narick, 177 W. Va. 11, 350 S.E.2d 11 (1986).¹³

The test for prohibition is also a stringent one. There is a five-part test for the awarding of a discretionary writ of prohibition, in cases alleging that a tribunal has exceeded its legitimate powers.

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order

¹³Petitioner has not argued that the ALJ has exceeded his jurisdiction, but rather that he has failed to act in accordance with a duty to the Petitioner, which, if shown to involve "substantial, clear-cut legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts," could be the basis of a discretionary writ. Hinkle v. Black, Syl. pt. 1, 164 W. Va. 112, 262 S.E.2d 744 (1979).

raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, Syl. pt. 4, 199 W. Va. 12, 483 S.E.2d 12 (1996), cited in State ex rel. Marshall County Commission v. Carter, 225 W. Va. 68, 689 S.E.2d 796 (2010).

Petitioner has identified no clear error of law; nor has the agency violated some clear right or failed in a clear duty.

In the Robinson matter below, the WVHRC properly carried out its investigative function, following procedure and reasonably exercising its discretion to arrive at a Probable Cause Determination. Inasmuch as the Probable Cause determination is not adjudicatory, and is merely preliminary to adjudication on the merits, there is no requirement for detailed findings and conclusions. Finally, there is no basis for concluding that Commission's counsel acted in this matter in a way which is inconsistent with the role of advisor to and advocate for the agency.

B. PETITIONER HAS ARTICULATED NO CLEAR RIGHT TO A DISMISSAL OF THE COMPLAINANT'S CASE.

Petitioner's central claim is that the ALJ has a mandatory duty to dismiss the Complainant's case because she allegedly "missed the deadline" to request an administrative review of the WVHRC's No Probable Cause Determination. Petition for Writ of Mandamus With Oral Argument Requested, p. 5.

The Petitioner's claim must fail for several reasons. First, the Complainant's request for reconsideration, which she made back in June 2011 during the investigation phase of the case, was not untimely. Second, even if it were untimely, the Petitioner's own failure to object in a timely fashion constituted a waiver of the issue. Finally, even if the Complainant's request had actually been untimely and the Petitioner's objection had been raised at the appropriate time, this would not be a sufficient basis to compel the ALJ to dismiss a discrimination complaint for which there is probable cause.

1. The Complainant's Request for a Review and Reconsideration Was Not Clearly Untimely.

Ten South claims that the Complainant's request for an NPC Review was "untimely." Ten South argues that when the HRC's initial NPC Determination was mailed to the Complainant on June 10, 2011, this act accomplished "service," and that regardless of when, if ever, the Complainant received the NPC Determination, her time to request a reconsideration under W. Va. Code § 5-11-10 expired on June 21, 2011, three days before she filed her written request. *Petition for Writ of Mandamus With Oral Argument Requested*, p. 13.

Ten South's argument is founded upon the undeveloped and unsupported proposition that "service" under W. Va. Code § 5-11-10 unambiguously means the mere posting of the document. Ten South fails to address the fact that "service" is not defined in the West Virginia Human Rights Act, and contrary to Ten South's assertion, the meaning of service in the statute, standing by itself, is not unambiguous.

Absent some type of definition, there is no more reason to conclude that mailing alone constitutes "service" than there would be to conclude that "service" requires actual personal hand delivery. In the absence of a statutory definition, the Executive Director, who is the person who must act upon this provision, would ordinarily be empowered to interpret its meaning in any reasonable way which is not contrary to the statute.

The Procedural Rules of the WVHRC do provide some guidance on this question. The definitional section of the WVHRC Procedural Rules provides: "The term 'service' when required by these rules shall be that service as is described in Rule 4 of the West Virginia Rules of Civil Procedure." W. Va. Code R. § 77-2-2.13. (emphasis supplied). This does not resolve the question, since the West Virginia Rules of Civil Procedure provide for various types of service under different circumstances, and no particular type of service for a letter of determination in a pre-litigation phase of a case.

More to the point, § 4.14.a. of the WVHRC's Procedural Rules is much more precise about what constitutes service of an NPC Determination and the particulars of the opportunity to request a review. It provides that "[r]equests for review. . . shall be filed at the

Commission office within ten (10) days from the date of complainant's receipt of such copy." W. Va. Code R. § 77-2-4.14.a. (emphasis supplied).

Ten South also fails to address the due process implications for the Complainant, who was explicitly told by the WVHRC in the NPC Determination notice that she had 10 days from the date of receipt to request a review. Good notice is a fundamental part of due process. If and when the Complainant received any formal notice of the initial NPC Determination, that notice would have advised her that:

The West Virginia Human Rights Act, as amended, provides that you may request an Administrative Review of the No Probable Cause determination. Such request shall be made within ten (10) days of receipt of this letter.

See Appendix to Writ of Mandamus, p. 00004 (emphasis supplied).

Surely it is not legally sufficient notice to the Complainant, if the notice deceives her regarding her deadline. It would be completely inconsistent with the Complainant's fundamental rights to retroactively deny her the time to request a review which the notice extended to her. In its Petition, Ten South completely fails to address this due process implication of its argument. It is a harsh and unjust interpretation which would consider the Complainant's request as untimely, even though the Complainant appears to have followed the directions which the agency provided.

2. Ten South's Objection to the Granting of the NPC Review Is Untimely.

It is well settled that a party to litigation is generally subject to a "raise it or waive it" rule.

One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue.

State v. McGilton, ___ S.E.2d ___, 2012 WL 2368894. No. 11-0410 (W. Va. Sup. Ct., June 19, 2012), quoting State v. LaRock, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (internal quotations and citations omitted).

See also Noble v. West Virginia Dep't of Motor Vehicles, 223 W. Va. 818, 679 S.E.2d 650 (2009) (In administrative proceedings, it is improper for the court to consider an issue not raised below.)

Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal.

Hanlon v. Logan County Board of Education, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997).

See also Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W. Va. 692, 703, 474 S.E.2d 872, 883 (1996) ("The law ministers to the vigilant, not those who slumber on their rights." (internal quotations and citations omitted)); State v. Asbury, 187 W. Va. 87, 91, 415 S.E.2d 891, 895 (1992) ("Generally the failure to object constitutes a waiver of the right to raise the matter on appeal."); Maples v. West Virginia Dep't of Commerce, Syl. pt. 1, 197 W. Va. 318, 475 S.E.2d 410 (1996); Hopkins v. DC Chapman Ventures, Inc., Syl. pt. 2, 228 W. Va. 213, 719 S.E.2d 381 (2011) (per curiam); Whitlow v. Board of Education, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Konchesky v. S.J. Groves & Sons Co., Inc., 148 W. Va. 411, 414, 135 S.E.2d 299, 302 (1964); Hoover v. West Virginia Board of Medicine, 216 W. Va. 23, 26, 602 S.E.2d 466, 469 (2004).

Petitioner claims that the Complainant's request to the Executive Director for a reconsideration of the NPC Determination was untimely; that she "missed that deadline." Petition for Writ of Mandamus With Oral Argument Requested, pp. 5, 13-14. Ironically, Ten South did not make this objection at the time of the Complainant's allegedly late request, or at any time while the matter was still pending before the Executive Director for determination of probable cause.

The request for reconsideration which is the focus of Ten South's argument was made by the Complainant in writing on June 24, 2011. Three days later, on June 27th, Ten South was sent a copy of the Complainant's request for reconsideration, with an explicit invitation to respond to the Executive Director in writing within 10 business days of receipt by Ten South. Because it was sent by certified mail, it is clear that Ten South received the invitation to respond on July 1, 2011. See Respondents' Supplemental Appendix, p. 4. The Executive Director waited until July 29th (which is 19 business days) before issuing a decision granting the Review; but in all that time Ten South never filed any objection to Complainant's request as being untimely, and having heard no objection, the Executive

Director granted the Review. Ten South continued to sit on what it now claims was a clear violation of its rights. On September 7, 2011, there was an NPC meeting at which Ten South was represented by counsel, David J. Mincer.¹⁴ At no time before, during, or after this meeting did Ten South or its counsel call to the attention of the WVHRC any objections to the Executive Director's decision to grant the Review, thereby waiving not only the timeliness issue, but any objection to the Executive Director's decision to grant the Review.

Prior to the issuance of the Probable Cause Determination, Robinson's Complaint was not technically litigation, and so parties to the investigation might be entitled to a more relaxed version of the "raise it or waive it" rule. However, with the issuance of the Probable Cause Determination, Ms. Robinson's Complaint gave rise to a contested case within the meaning of the Administrative Procedures Act, W. Va. Code § 29A-1-2(b) and § 29A-5-1 et seq., and Ten South became a party to litigation.

On October 31, 2011, Ten South filed a formal Answer to the Amended Complaint, as required by the Notice of Public Hearing, Appendix to Writ of Mandamus, pp. 00016-00024, and Rule 6.1. of the WVHRC Procedural Rules. Even at this stage, when Ten South was under an explicit duty to file an Answer containing "a statement of any matter constituting a defense," WVHRC Procedural Rule 6.3 b., Ten South made no mention of this alleged untimely review request by the Complainant, nor the Executive Director's allegedly improper granting of this request.¹⁵ It was not until seven months after the NPC Review was granted, five and a half months after the Probable Cause Determination was made, and five months after the Answer was filed that Ten South raised this issue for the first time. Clearly, this failure constituted a waiver of the objection.

In its request for relief from this Court, Ten South completely fails to address its own untimeliness in raising this issue of alleged untimeliness by the Complainant. It would be profoundly unjust to give Petitioner the windfall benefit of a minor delay on the part of

¹⁴Because Ten South did not raise the timeliness issue regarding her request for Review, the Complainant was not questioned about it.

¹⁵See Answer of Ten South Management Company, LLC d/b/a Vista View, Appendix to Writ of Mandamus, pp. 00027-00035.

Complainant, which caused the Petitioner no prejudice, by overlooking the complete failure by the Petitioner to raise this objection until the case had moved well into the next stage.

Assuming for the sake of argument that the Complainant's request for a review was clearly untimely (which it was not), the applicable law would nevertheless require the denial of Ten South's Petition because Ten South has sat on its rights and waived its objection. No where in its Petition, or in the similar motion to the ALJ, has Ten South addressed the matter of its untimely objection.¹⁶

3. Petitioner Has No Clear Right to a Dismissal of the Case Prior to a Hearing on the Merits.

Even apart from the fact that Robinson requested a review as she was instructed to do by the agency, and apart from the fact that Petitioner has sat on its untimeliness objection, Petitioner has failed to establish that it has a clear right to the dismissal of this case without adjudication on the merits.

The West Virginia Human Rights Commission is explicitly authorized "to receive, investigate and pass upon complaints alleging discrimination." W. Va. Code § 5-11-8(c). The agency is also empowered "to do all other acts and deeds necessary an proper to carry out and accomplish effectively the objects, functions and services contemplated by the provisions of this article." W. Va. Code § 5-11-8(h).

The purpose of investigations, fact findings, and reviews undertaken by the WVHRC pursuant to W. Va. Code § 5-11-10 is to "determine the validity of complaints advanced by potential litigants," Allen, 324 S.E.2d at 110-111. The responsibility for making those determinations fairly, efficiently, and accurately belongs to the WVHRC. Encompassed within this responsibility is a duty to correct misapprehensions about the legitimacy of

¹⁶Timeliness defects would not be subject to waiver only if they were jurisdictional. This Court, addressing time limitations in the context of the Human Rights Act, including the complaint filing deadline, which is more critical than the deadline involved here, has held that they are not jurisdictional, but rather, are subject to waiver and equitable doctrines. Syl. pt. 1, Independent Fire Company No. 1 v. West Virginia Human Rights Commission, 180 W. Va. 406, 376 S.E.2d 612 (1988); Syl. pt. 5, Naylor v. West Virginia Human Rights Commission, 180 W. Va. 634, 378 S.E.2d 843 (1989). Lack of jurisdiction has not been argued by the Petitioner, so it will not be addressed here.

complaints, so that the purpose of the WVHRC, to eliminate discrimination, is served. This requires some flexibility and discretion on the part of the agency.

Ten South asserts, without any explanation or authority, that “the statute in question does not allow the Commission any discretion to accept untimely written requests for Administrative Reviews.” *Petition for Writ of Mandamus With Oral Argument Requested*, p. 14. However, when the Human Rights Act is read with its purposes in mind, this alleged fatal lack of discretion by the agency is anything but clear.

The statute in question does not explicitly provide for any role in the NPC Review for the accused perpetrator of discrimination, setting up the review process as an interaction between the complainant and the agency. Respondents before the Commission are included in the review process because, in the agency’s judgment, it enhances efficacy and fairness in outcomes. Ten South’s knowledge of the Review process and the active role it played in the NPC Review are both the result of an act of discretion by the WVHRC.

The West Virginia Legislature, in creating the Human Rights Act, built into the statute a specific requirement that “the provisions of this article shall be liberally construed to accomplish its objectives and purposes.” W. Va. Code § 5-11-15. This Court has repeatedly applied this liberal construction rule, and has repeatedly directed that such “construction applies to both its substantive and procedural provisions, and is consistent with this Court’s view that administrative proceedings should not be constrained by undue technicalities.” *May Dep’t Stores Co. v. West Virginia Human Rights Commission*, Syllabus, 191 W. Va. 470, 446 S.E.2d 692 (1994), *citing* Syl. pt. 1, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990).

One application of the liberality rule is the making of an appropriate distinction between statutes which are mandatory, where a failure to comply can deprive an agency of its authority, and those which are directory, where the seriousness and the consequence of non-compliance is not so great. See *EEOC v. Kimberly-Clark Construction*, 511 F.2d 1352, 1361 (6th Cir. 1975), *cert. denied*, 423 U.S. 994, 96 S. Ct. 420, 46 L. Ed. 2d 368 (1975); and Norman J. Singer, *Sutherland Statutory Construction*, § 25.03 at 449 (5th ed. 1991), *cited in* *West Virginia Human Rights Commission v. Garretson*, 196 W. Va. 118, 468 S.E.2d 763 n.5, n.11 (1996). One of the clear indicators of a directory statute is that

it does not specify a consequence for the failure to comply. St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140, 106 S. Ct. 2245, 90 L. Ed. 2d 692 (1986).

In W. Va. Code § 5-11-10 there is no consequence specified for a failure by a complainant to make a timely request for a review meeting. Indeed, the point of this provision seems to be that the WVHRC is to endeavor to make sound determinations, even to the point of holding meetings after the investigation is complete, to ensure that some important point is not missed.

In this case, the agency, after investigating the matter and reconsidering its investigatory conclusions, determined that probable cause exists to credit the Complainant's allegations of race discrimination. Denying her the opportunity to avail herself of the WVHRC's adjudicatory process to litigate her claims would undermine the public policy objectives of the West Virginia Human Rights Act.

C. PETITIONER HAS NO ENTITLEMENT TO SPECIFIC FINDINGS OF FACT FROM THE AGENCY UNTIL THE MATTER HAS BEEN TRIED ON THE MERITS.

Petitioner next asserts that with the Probable Cause Determination it is entitled to a written order from the agency setting forth findings. Petitioner further asserts that the ALJ should be compelled to issue a subpoena for "any documents or evidence submitted by Respondent Robinson to meet her burden and any written report or explanation from Paul Sheridan as to whether and how Respondent Robinson met her burden." Petition for Writ of Mandamus With Oral Argument Requested, pp. 14-15. The first point flows from the misconception of the NPC Review as an adjudication, subject to review and other procedural requirements befitting of an agency final order. The second point attempts to blatantly invade the attorney-client privilege of the agency.

There is nothing in the West Virginia Human Rights Act or in the Commission's Procedural Rules which require an order with detailed findings or conclusions upon the issuance of a Probable Cause Determination, which is a preliminary stage, and Petitioner has cited no authority on this point. West Virginia Code § 5-11-10 provides that if, after a review meeting "it shall be determined. . .that probable cause exists for substantiating the

allegations of the complaint, the commission shall immediately endeavor or eliminate the unlawful discriminatory practices," first by conciliation, and failing that, by initiating an adjudication of the claims in the complaint.

The Commission's Procedural Rules provide that: "All decisions and actions growing out of or upon any such review shall be reserved for determination by the chairperson or the executive director." W. Va. Code R. § 77-2-4.14.f.1. While counsel for the Commission is to preside at the meeting and is to make a recommendation to the Director, W. Va. Code R. §§ 77-2-4.14.f.2. and 77-2-4.14.f.3., the decision regarding the matter is left to the chairperson of the commission or the Executive Director. The Rules further provide that, "The chairperson or executive director may reopen the case or may make such other disposition as she/he deems appropriate." W. Va. Code R. § 77-2-4.14.f.3.

There is no requirement in the statute or the Rules that supports the proposition that a detailed order containing findings and conclusions must be issued by the agency at this preliminary stage of the case.

Petitioner asserts that "it is axiomatic that a litigant in a contested case is entitled to a written Order containing detailed findings of fact and conclusions of law on any adjudicatory decision[.]" Petition for Writ of Mandamus With Oral Argument Requested, p. 7. This statement is true, as far as it goes, but this entitlement comes into play after the case has been litigated, and as part of the agency's final disposition. Such a final agency decision is, indeed, reviewable, and a detailed order is required in order facilitate that review. The agency's decision to find probable cause is not adjudication. What the agency does when it makes a Probable Cause Determination is the gatekeeping function described in Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 150, 324 S.E.2d 110-111 (1984). This is not a stage of the proceedings where detailed findings would be practical or appropriate; nor does the Petitioner have any clear right to insist upon them.

The term "contested case" does not refer to every matter before an agency; it is a term of art under the Administrative Procedures Act, W. Va. Code §§ 29A-1-1(b) and 29A-5-1 et seq., which does not apply to this matter at the preliminary stage. This did not become a "contested case" within the meaning of the APA until the Probable Cause

Determination. Petitioner seeks to invoke procedures designed for final agency orders to an agency decision which is clearly preliminary.

If the law entitled Petitioner to judicial review of this preliminary WVHRC decision, then every complainant and respondent before the WVHRC who disagrees with the conclusion of an investigation, the purpose of which is to efficiently screen complaints, would be entitled to a judicial review of this preliminary determination. Such an outcome would place a choke hold on the administrative process, and would thwart the Legislature's goal of providing an efficient administrative process.

The Petitioner's request in this action for discovery of documents submitted by Complainant to the WVHRC is redundant and completely unnecessary. To the extent that Petitioner seeks to discover, through subpoena duces tecum, documents provided by the Complainant to the Commission during the investigatory phase of this case, this information is all available to the Petitioner through the administrative discovery procedures currently in process below.¹⁷

To the extent that Petitioner seeks to discover, through subpoena duces tecum, the legal advice regarding Robinson's Complaint, which was provided by counsel for the Commission to the Executive Director of the Commission, it is a blatant attempt to violate the agency's attorney-client privilege.

It is more than well settled that communications between attorneys and their clients, undertaken for the purpose of obtaining legal advice, are privileged; and that courts and other tribunals are to protect from compelled disclosure these communications and/or records pertaining to or reflecting these communications. Because the attorney-client relationship is considered to be "a sacred one," Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 3d ed., Vol. 1, p. 561, and because the privilege is so vigorously protected, courts use a five-part test, which was set forth in the case of United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), for determining when the

¹⁷Despite the fact that Ten South failed to explicitly request all documents submitted by Robinson to the WVHRC prior to the issuance of the Probable Cause Determination as part of its written discovery requests, upon information and belief, all such documents have, in fact, been turned over to Ten South.

attorney-client privilege applies. The privileged communication must: (a) involve a client; (b) involve a lawyer acting as a lawyer; (c) not involve non-client third parties; (d) and have been for the purpose of obtaining a legal opinion or other legal services or assistance. In addition: (e) the privilege must not have been waived.

In this instance, all of the tests are clearly met. Indeed, communication between Commission counsel and the WVHRC or its Executive Director regarding advice and counsel in connection with the agency's determination of Probable Cause or No Probable Cause is a paradigm example of privileged attorney-client communications.

This information is also subject to the attorney work product privilege. The work product of an attorney, "in so far as it involves mental impressions, conclusions, opinions, or legal theories concerning litigation is immune from discovery to the same extent as attorney-client communications." Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 3d ed., Vol. 1, p. 569.

Petitioner has failed to demonstrate a clear legal right, either to an order detailing the Commission's determination of Probable Cause, or to a subpoena for the content of the advice given by Commission's counsel to the Executive Director. The ALJ properly denied Petitioner's requests for this relief. This Court should do the same.

D. THE COMMISSION'S COUNSEL WHO ASSISTED AND ADVISED THE EXECUTIVE DIRECTOR IN DETERMINING THAT ROBINSON'S COMPLAINT HAD PROBABLE CAUSE IS NOT DISQUALIFIED FROM REPRESENTING THE WVHRC, AND THE INTERESTS OF MONICA ROBINSON, IN THE ADJUDICATION OF THIS MATTER.

Petitioner next argues that the counsel for the WVHRC, who participated in the Administrative NPC review and advised the Executive Director regarding the Probable Cause Determination which initiated the contested case, must be disqualified from serving as counsel in the adjudication of that case. Petitioner's argument is that the counsel has violated the West Virginia Rules of Professional Conduct, Rule 1.12(a), by serving as judge and lawyer in the same matter. *Petition for Writ of Mandamus With Oral Argument Requested*, p. 15.

Petitioner fails to establish any clear right or duty which would compel the disqualification of Commission's counsel. In order to make its case for disqualification, Petitioner mischaracterizes the role of Commission's Counsel at the Administrative NPC Review as that of a "hearing officer," and argues that what occurred was an "adjudication." Petitioner also has some misapprehensions about the role of Commission's counsel in the subsequent litigation.

The actions of Commission's counsel in connection with this case were all in accordance with law. The West Virginia Human Rights Act, W. Va. Code § 5-11- 7, provides:

The attorney general of the state shall render legal services to the commission upon request made by the commission or by the chairman or the executive director thereof.

The role of legal advisor and legal advocate are generally encompassed within the meaning of the term "legal services," and there is normally no conflict between the roles, particularly since they are often inherently combined. The WVHRC sometimes looks to its counsel for advice in discerning PC cases, which is particularly appropriate inasmuch as the WVHRC's task is discerning probable cause

parallels the gatekeeping function performed by private attorneys who, prior to filing civil actions in the appropriate forum, determine the validity of complaints advanced by potential litigants, and is related to the role served by the Commission in furnishing legal representation to complainants who reach the hearing stage of the administrative process.

Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 324 S.E.2d 99, 110-111 (1984) (emphasis supplied).

The Human Rights Act also specifies that Commission's counsel are to be employed in presenting cases where probable cause has been found. "The case in support of the complaint shall be presented before the commission by one of its attorneys or agents." W. Va. Code § 5-11-10.

When Petitioner raised these issues of conflicting roles below, the ALJ correctly assessed that Commission's counsel has consistently acted as lawyer for the agency (both as advisor and as advocate, which are not conflicting roles), and never as judge or hearing

officer. Accordingly, the ALJ properly declined to disqualify Commission's counsel, and this Court should do so as well.

1. The Commission Is Exercising its Investigatory Powers When it Makes and Reviews its Own Investigatory Determinations, and Is Not Conducting an Adjudication.

The West Virginia Human Rights Act establishes a legislative scheme for the docketing, investigation, conciliation, and adjudication of complaints of employment and public accommodations discrimination. With regard to the Commission's role as an investigatory body, the Commission engages in the following pre-adjudication steps:

Once a complaint is filed with the HRC, an investigation by the HRC into the allegations contained in the complaint is commenced. During this investigatory stage, the HRC assigns an investigator to the case who may conduct interviews, order production of documents and completion of interrogatories. See W. Va. Code § 5-11-10; 6 W. Va. C.S.R. § 77-2-4.2.

At the close of this investigation, the investigator makes a recommendation as to whether probable cause exists to substantiate the allegations found in the complaint. If it is determined that probable cause exists, then a probable cause determination letter is sent to the parties, and if conciliation is unsuccessful, the case is set for hearing. See 6 W. Va. C.S.R. §§ 77-2-4.5 to -4.6.

In contrast to a probable cause determination, when the investigator makes a recommendation that no probable cause supports the allegations in the complaint, a determination letter to that effect is also sent to the parties. See 6 W. Va. C.S.R. 77-2-4.10. This determination letter explains the procedure to request an administrative review of the "no probable cause" determination.

If an administrative review of the "no probable cause" determination occurs, the HRC reviews the investigator's recommendation along with any new information submitted by the parties and the initial "no probable cause" determination is either affirmed, reversed and set for hearing, or remanded within the HRC for further investigation. See 6 W. Va. C.S.R. § 77-2-4.8(b).

Jones v. Glenville State College, 189 W. Va. 546, 550-551, 433 S.E.2d 49, 53-54 (1993).

The NPC Review process is a "quality control" mechanism, built into the agency investigatory procedures to help ensure that appropriate decisions are made regarding

which cases are to proceed to adjudication. In cases where the Commission has reached an investigatory determination of no probable cause, the West Virginia Human Rights Act authorizes complainants, or their counsel, to request an opportunity to meet with the Commission to explain why a determination of probable cause should be adopted by the agency. W. Va. Code § 5-11-10. The Commission has developed a review process that provides a procedure for making such requests, but also broadens participation to include respondents like Ten South, even though the Commission is not required by statute to do so. *Compare* W. Va. Code § 5-11-10 and W. Va. Code R. § 77- 2-4.14. This inclusive approach provides respondents with an opportunity to hear a complainant's basis for requesting a reversal of the no probable cause determination and to respond to the information presented by the complainant. These joint meetings are more efficient for the Commission and the parties because the joint meetings limit the need to conduct additional investigation subsequent to the review meeting.

The ALJ below concluded, relying on Jones, that the Commission acts as an investigatory body when it decides whether or not probable cause exists. Petitioner asserts that "*Jones* is inapposite," and was misapplied by the ALJ below, because, Petitioner claims, "Petitioner does not assert that the No Probable Cause Determination was an adjudication on the merits." Petition for Writ of Mandamus With Oral Argument Requested, p. 16. It does, however, assert that Commission counsel's "role" at the review meeting "was adjudicatory in nature." But this is a disingenuous distinction. Clearly, the NPC Review, as with every other aspect of the investigation, was concerned with "the merits" of the case, and whether or not there was sufficient basis to proceed on the claim to a hearing. It just was not an "adjudication." And while it is true that the holding in Jones related to whether a No Probable Cause Determination was *res judicata*, which is not the issue here, the holding in Jones flowed directly from the Court's conclusion that the WVHRC preliminary decision of probable cause or no probable cause was not an adjudication. In deciding the case, the Court concluded that

[t]o label the investigatory procedure utilized by the HRC in making a "no probable cause" determination an adjudication on the merits of the case would be a ruse. Accordingly, we hold that a "no probable cause" determination by the HRC is not an adjudication on the merits of a discrimination complaint

since the parties have not been afforded a public hearing in which to litigate the merits of the facts and issues propounded in the complaint.

Jones, 189 W. Va. at 552, 433 S.E.2d at 55.

This Court in Jones concluded that the Commission acts as an *investigatory body* when it investigates a complaint, issues a determination, or conducts a review of its no probable cause determinations. “[I]t is clear that the HRC has only acted as an *investigatory body, not a judicial body*, in ascertaining whether probable cause existed to support the allegations in the complaint.” Jones, 189 W. Va. at 552, 433 S.E.2d at 56 (emphasis supplied). It is only after a probable cause determination has been issued that adjudications occur before the West Virginia Human Rights Commission. Id. Consequently, Commission’s counsel could not have been acting in an “adjudicatory role” during the NPC Review process.

Petitioner argues that the NPC Review must be “adjudicatory” because it is a determination “of whether the Complainant can meet his or her burden to show that the No Probable Cause Determination was arbitrary, capricious, or not in accordance with the law.” Petition for Writ of Mandamus With Oral Argument Requested, p. 16. This “burden” language is contained in the WVHRC Procedural Rules, § 77-2-4.14.f.2., and if it is read in isolation, this language might suggest an adjudicatory proceeding. However, it must be noted that the Complainant who bears this “burden” has no practical ability to adjudicate her complaint at this stage. Complainant has no access to the investigatory file which has been developed to justify the agency’s no cause assessment.¹⁸ At the Review, a complainant is left to point out what she thinks is most important about her case, so that if something has been overlooked, it can now be considered. In addition, she has no right to call or cross examine witnesses in order to meet this” burden,” and no right to a review

¹⁸Most of the contents of the investigation, which involve personnel information and personnel decisions of the employer, are not available to the Complainant at the time of the NPC Review. Indeed, most of the investigatory material obtained from Ten South came pursuant to a Protective Order, which secured this information from disclosure to the Complainant. See Respondents’ Supplemental Appendix, pp. 32-33.

if the agency's final determination is No Probable Cause. Surely from the perspective of the Complainant, this would not begin to meet the requirements of an adjudication.

When the "burden" language of Rule 4.14.f.2. is read in the context of the statutory framework and the purposes and functions of the HRC, it is clear that it is intended to indicate that complainants should come to the review meeting prepared to persuade a skeptical representative of the agency that it should reverse course and permit and assist in an adjudication on the merits or the subject claim.¹⁹ This burden language in the regulation may be confusing to an attorney who is used to seeing this language in connection with an APA adjudication, but this language does not alter the nature of the event, as established by statute. It does not render this agency determination an adjudication.

To the extent that the administrative NPC Review was a "hearing," it was clearly an investigatory "hearing" and was certainly not in the nature of an adjudicative hearing.²⁰ No

¹⁹To the extent that the Complainant must carry a burden, she must carry it with the Executive Director, and not with Commission counsel, since there has been no delegation of decisional authority. *See pp. 27-32 infra.*

²⁰*Black's Law Dictionary*, 5th edition, defines *hearing* as:

Proceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order. It is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception, and to hearings before administrative agencies as conducted by a hearing examiner or Administrative Law Judge.

The introduction and admissibility of evidence is usually more lax in a hearing than in a civil or criminal trial.

An adversary hearing exists when both parties are present at the hearing arguing their respective positions. An *ex parte* hearing exists when only one party is present at the hearing.

Hearings are extensively employed by both legislative and administrative agencies and can be adjudicative or merely investigatory. Adjudicative hearings can be appealed in a court of law. Congressional committees often hold hearings prior to enactment of legislation; these hearings are then important sources of legislative history.

witnesses were called or examined, there was no opportunity cross examination by either party, and no record was made.

The fact that this review process involves the Commission's counsel as advisor does not change the inherent investigatory characteristic of the review process. By reviewing the investigatory file, talking with the parties, and advising the Executive Director regarding whether the Commission should stand with the Complainant in pursuit of her claim, counsel for the Commission is furnishing legal services and advice to the Commission in connection with the conclusion to the investigation.

2. Rule 1.12(a) Does Not Prohibit Commission's Counsel from Appearing Before this Tribunal to Represent the Commission and Present the Case on Behalf of the Complainant.

Ten South contends that Rule 1.12(a) of the *West Virginia Rules of Professional Conduct* mandates the disqualification of Commission's counsel from appearing on behalf of the Commission and Ms. Robinson in the substantive litigation of the instant complaint.²¹ This argument is premised upon a mischaracterization of the role of counsel for the Commission at the September 7, 2011, meeting as that of "Hearing Officer/Adjudication Officer." Petition for Writ of Mandamus With Oral Argument Requested, p. 18. In fact, Counsel for the Commission has occupied no judicial or adjudicative position with regard to this case.

Here, the Executive Director assigned responsibility for reviewing the investigation to the Civil Rights Division pursuant to W. Va. Code R. § 77-2-4.14.c. As part of the review, Commission's counsel met with the parties and elicited information from the Complainant about why she disagreed with the Commission's initial determination. Despite no statutory requirement compelling the presence of Ten South, the Commission's process allowed Ten South and its counsel to be present and hear the Complainant's presentation of facts and information. Ten South also was given the opportunity to comment upon the Complaint

²¹In addition to prohibiting a lawyer from representing anyone in connection with a matter in which the lawyer previously served as a judge, Rule 1.12 also prohibits other lawyers in the same firm from undertaking the same representation except under limited circumstances. Given Ten South's assertions, it appears that Ten South would oppose any member of the Civil Rights Division appearing in this matter. See Appendix to Writ of Mandamus, p. 00033.

and the Complainant's presentation of information. Thereafter, Commission's counsel provided legal advice to the Executive Director regarding whether or not the agency should take up Ms. Robinson's Complaint and furnish legal services to her in connection with the same.

There was no delegation of authority to Commission's counsel, as there must be to a judge or judicial officer. The Commission's Procedural Rules clearly provide, "All decisions and actions growing out of or upon any such review shall be reserved for determination by the chairperson or the executive director." W. Va. Code R. § 77-2-4.14.f.1. The role of Commission's counsel was to subsequently advise the Executive Director, who in spite of any recommendation by counsel, is empowered to "make [any] other disposition she/he deems appropriate." W. Va. Code R. § 4.14.f.3. Petitioner refers to "Sheridan's decision from the Administrative Review Hearing," Petition for Writ of Mandamus With Oral Argument Requested, p. 17; however, it was the Executive Director who elected to pursue the Complainant's race discrimination claim, and issued a probable cause determination. Appendix to Writ of Mandamus, pp. 00013-00015.

Commission's counsel issued no ruling and made no findings of fact or conclusions of law on the merits of the Complainant's claims.²² Counsel simply advised the Commission on whether to take up the Complainant's charge of discrimination as its own. Patently, there was no adjudication on September 7, 2011,²³ and therefore Commission's counsel did not serve as "hearing officer and/or adjudication officer," or an "administrative review judge." He played no judicial or quasi judicial role whatsoever which would implicate Rule 1.12(a).

Petitioner erroneously asserts that it "objected to Mr. Sheridan's representation as soon as he entered his appearance on behalf of the Respondent in its Answer." Petition for Writ of Mandamus With Oral Argument Requested, p. 18. However, a careful reading

²²Petitioner asserts that the NPC Review and the subsequent determination is tantamount to a circuit court ruling on a Rule 12(b)(6) motion to dismiss. Petition for Writ of Mandamus With Oral Argument Requested, pp. 17-18. This is not a valid comparison. As this Court recognized in Allen, the best comparison for that decision is that of a private attorney deciding whether to take on a case.

²³W. Va. Code R. § 77-2-4.14.f.6.

of the objection in its Answer reveals that Ten South's objection was not to counsel's participation as advocate. Rather, Ten South's objection (now that Probable Cause has been issued) was to "an interested party with every motivation to take the Complainant's side," Petition for Writ of Mandamus With Oral Argument Requested, p. 18, *citing* Answer, Appendix to Writ of Mandamus, p. 00033), having participated in the Probable Cause Determination.

Petitioner seems additionally confused about the role of Commission's counsel in the adjudication of this contested case before the ALJ. Petitioner asserts, erroneously, that Sheridan "entered an appearance on [sic] as counsel for Respondent Robinson." Petition for Writ of Mandamus With Oral Argument Requested, p. 19. In fact, as is clearly revealed in the Notice of Appearance, Appendix to Writ of Mandamus, p. 25, Sheridan's appearance is "on behalf of the Commission" with a purpose to "prepare and present the claims of the Complainant [Robinson]." This is the proper role of Commission's counsel which is established by the West Virginia Human Rights Act, and which has been repeatedly recognized by this Court. Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 324 S.E.2d 99 (1984); Jones v. Glenville State College, 189 W. Va. 546, 433 S.E.2d 49 (1993).²⁴ While Commission's counsel also advocates for the position of the Complainant, this is no conflict because the WVHRC had adapted this position.²⁵

Because of the various functions of governmental agencies, legal counsel to governmental agencies are sometimes placed in potentially conflicting roles; however,

²⁴In 1986, the Legal Ethics Committee of The West Virginia State Bar considered whether Commission's counsel could represent both the interests of the complainant and those of the WVHRC at WVHRC public hearings. In a published opinion, the Committee notes the nondiscretionary duty of the HRC, through its counsel, to present the case for a complainant at the public hearing, where there has been a finding of probable cause. The Committee goes on to note that there is no necessary conflict here, so long as the interests of the WVHRC, which are counsel's primary duty, do not diverge from those of the complainant. Respondents' Supplemental Appendix, pp. 34-38.

²⁵Ironically, if there is anyone who might legitimately feel prejudiced by this combination of roles, it would be complainants. Because a decision by the WVHRC to issue a probable cause determination adds to the work load of Commission's counsel, and brings no remuneration or benefit of any kind to Commission's counsel, a complainant might reasonably be concerned that Commission's counsel would lean toward recommending no probable cause.

there is nothing about the roles played by Commission's counsel in this matter which create conflict nor which prejudice the Petition. In addition, if one sheds Petitioner's mischaracterization, there is no appearance of impropriety.

Participation by the Commission's counsel in public hearings on behalf of unrepresented complainants ensures that the agency takes all possible measures to prosecute violations of the Human Rights Act. This practice ensures that each complaint which merits a probable cause finding is prosecuted fully on behalf of not only the individual complainant, but also on behalf of the citizens of the State of West Virginia in an effort to eliminate unlawful discrimination in West Virginia. Participation of Commission's counsel in the probable cause/no probable cause determination process does not operate to exclude counsel from appearing in litigation to which the West Virginia Human Rights Commission is a party. Such an appearance does not violate the *West Virginia Rules of Professional Conduct*, is entirely consistent with all applicable precedent, does not create a conflict of interest, and is not contrary to the rights of the parties to this matter.

3. Ten South Has Identified No Persuasive Authority Which Supports the Disqualification of Commission's Counsel.

In support of its Petition, Ten South has failed to identify any authority that the disqualification of Commission's counsel from participating in the prosecution of Ms. Robinson's claim is either appropriate or required. Rather, Ten South has sought to have this Court evaluate its disqualification request pursuant to a judicial recusal standard. Cases involving judicial recusal often turn upon questions of impartiality and propriety. For example, the two cases cited by Ten South, Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995),²⁶ and Liljeberg v. Health Services Acquisition

²⁶In Tennant, this Court determined that a new trial was not warranted in a case where the trial court judge sought to recuse himself after realizing that he was represented in another matter by defense counsel in the underlying case. This decision focuses on the standard for granting a new trial, and determines that absent evidence of actual bias resulting in error, a new trial need not be granted even though there may have been the appearance of impartiality. There is no discussion of Rule 1.12(a) or the disqualification of counsel. See Tennant, 194 W. Va. 97, 459 S.E.2d 374 (1995).

Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988),²⁷ discuss judicial impartiality. These cases relate in no way to the disqualification of an attorney from representing a client. Moreover, the “impartiality” standard set forth by these cases is inconsistent with analyzing the potential disqualification of counsel for a party, who by definition, is appearing on behalf of a partisan in any given proceeding.

Ten South has presented no persuasive authority which supports its position because there is none. No legitimate basis exists to disqualify the Commission’s counsel from appearing and presenting the case on behalf of the Commission and Ms. Robinson. All of the relevant authority suggests that the Civil Rights Division’s participation is mandatory. W. Va. Code § 5-11-10; Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 324 S.E.2d 99 (1984).

4. Petitioner Suffers No Prejudice by the Continued Involvement of Commission’s Counsel, as Advocate for the Agency, in the Adjudication of this Matter.

Petitioner has alleged that Commission’s counsel is “an interested party with every motivation to take the Complainant’s side.” Petition for Writ of Mandamus With Oral Argument Requested, p. 18, *citing* Answer, Appendix to Writ of Mandamus, p. 00033. These charges, are completely unfounded, and inconsistent with some of Petitioner’s other unsubstantiated claims,²⁸ and are illogical. Also, contrary to its claims, Petitioner failed to make this objection to Mr. Sheridan’s participation in the litigation until long after his Notice of Appearance, when discovery disputes began to arise. However, more to the point, these

²⁷In Liljeberg, the United States Supreme Court of Appeals discussed and set forth the disqualification test for jurists pursuant to the federal Judicial Code based upon an appearance of partiality. See Liljeberg, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

²⁸In its Answer, Appendix to Writ of Mandamus, p. 00032, Ten South alleged that at the NPC Review “Paul Sheridan stated on more than three occasions. . . that he did not see how Complainant’s Race [sic] played any role in those personnel actions.” The Commission rejects Ten South’s characterization of counsel’s remarks. However, if Commission counsel had expressed such doubts about Complainant’s claims as alleged, it would reflect something other than an inclination to side with the Complainant. It would also suggest that if Commission’s counsel ever came to see merit in Robinson’s case (and this is not known, because it was the Executive Director who made the Probable Cause Determination) it had to be based on something learned in file review or investigation which came after the review meeting.

charges by Petitioner fail to establish a basis for disqualification, even if they were completely true.

The task of Commission's counsel in this litigation, because the agency found probable cause, is to present Robinson's case. He represents the agency itself, and he is currently motivated to take the Complainant's side in the litigation, because his client agency, the WVHRC, has assigned him to do just that.

Petitioner has failed to establish that it has suffered any prejudice as a result of the same counsel advising the Executive Director on the question of probable cause and then representing the agency in the subsequent litigation which is triggered by that Probable Cause Determination.

5. Ten South's Requested Relief Would Operate to Deny the Commission Access to Legal Counsel, Reduce the Ability of the WVHRC to Make Sound Preliminary Decisions, and Undermine the Policy Objectives of the West Virginia Human Rights Act.

Ten South objects to the fact that Commission's counsel participated in the NPC Review process and has appeared before this tribunal to present the case on behalf of the Commission and the Complainant. Ten South asserts that this is a conflict of interest, but other than improperly invoking Rule 1.12(a), Ten South provides no basis for its conflict of interest argument. This is because there is no conflict of interest in an attorney, first, advising his client about potential litigation and, then, representing his client in the litigation. Moreover, the Commission's access to legal counsel in the NPC Review process is not contrary to any of Ten South's rights or reasonable expectations.

Fundamentally, Ten South disagrees with the Commission's Probable Cause Determination. It has sought to vent this displeasure through meritless legal maneuvers which are designed to attack the Commission's power to effectively pursue its mandate to eliminate discrimination.

If Ten South were to prevail in disqualifying counsel, the practical effect would be to deny the Commission access to legal counsel, either during the investigatory determination process or in the litigation of probable cause complaints. Not only is such a result contrary to law and unnecessarily invasive and disruptive to the attorney-client

relationship, it would undermine the goal of the West Virginia Human Rights Act to eradicate unlawful discrimination in West Virginia.

CONCLUSION

The Petitioner has failed to establish that it is suffering a deprivation of any clear right or that the ALJ has failed to perform some mandatory act, and so has failed to meet its burden for the issuance of a writ. Accordingly, this Petition for Writ of Mandamus should be dismissed or otherwise denied.

Respectfully submitted,

WEST VIRGINIA HUMAN
RIGHTS COMMISSION,
By Counsel.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



PAUL R. SHERIDAN
DEPUTY ATTORNEY GENERAL
WV State Bar ID No. 3373
JAMIE S. ALLEY
SENIOR ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
WV State Bar ID No. 7682
208 Capitol Street, 3rd Floor
Post Office Box 1789
Charleston, West Virginia 25326-1789
(304) 558-0546
Counsel for the West Virginia
Human Rights Commission

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-0678

STATE OF WEST VIRGINIA
ex rel. TEN SOUTH MANAGEMENT
COMPANY, LLC, doing business
as VISTA VIEW,

Petitioner,

v.

ORIGINAL JURISDICTION
MANDAMUS

HONORABLE ROBERT B. WILSON,
Acting Chief Administrative Law Judge
of the West Virginia Human Rights
Commission, and MONICA ROBINSON,

Respondents.

CERTIFICATE OF SERVICE

I, Paul R. Sheridan, Deputy Attorney General of the State of West Virginia, do hereby certify that the foregoing Response of the West Virginia Human Rights Commission to Petition for Writ of Mandamus With Oral Argument Requested and Respondents' Supplemental Appendix were served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 9th day of July 2012, addressed as follows:

To: David J. Mincer, Esq.
Charles R. Bailey, Esq.
Bailey & Wyant, P.L.L.C.
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
Counsel for Petitioner

The original and ten copies were hand delivered this date to:

The Honorable Rory L. Perry II, Clerk
West Virginia Supreme Court of appeals
State Capitol, Room E-317
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305


PAUL R. SHERIDAN