



STATE OF WEST VIRGINIA  
STATE AUDITOR'S OFFICE  
CHARLESTON  
25305

GLEN B. GAINER, JR.  
STATE AUDITOR  
AND  
COMMISSIONER OF SECURITIES

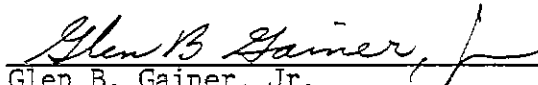
GLENN M. NICHOLS  
DEPUTY SECURITIES COMMISSIONER  
AREA CODE 304  
PHONE 5582257  
FAX: 304 - 344-2229


FILED  
NOV 5 10 40 AM '92  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Notice of Agency Adoption

Legislative Rule: Appointment of Special Deputy  
Commissioner of Forfeited and  
Delinquent Lands.

The above titled legislative rule constitutes the official rule adopted by the Division of Forfeited and Delinquent Lands in the State Auditor's Office on the 4th day of November, 1992 and filed pursuant to law in the office of the Secretary of State, State of West Virginia.

  
Glen B. Gainer, Jr.  
State Auditor  
Commissioner of Forfeited and Delinquent Lands

  
Russell Rollyson  
Director of Forfeited and Delinquent Lands

4 November 1992  
Entered

State Auditor  
Title 155  
Series 1

### FACTS AND CIRCUMSTANCES CONSTITUTING EMERGENCY

The immediate need for the emergency rule allowing the State Auditor to appoint a member of his staff as deputy commissioner of forfeited and delinquent lands is evident in the number of complaints received by this office. Deputy commissioners have repeatedly refused to comply with §11A-4-5 and §11A-4-10 of the West Virginia Code, causing a hardship upon individual taxpayers, who wish to redeem their property, but because of the actions of deputy commissioners, are unable to. The failure of deputy commissioners to act upon the properties that have been certified to them is also costing the individual counties money, by not making the property taxable. Not only that, the individual who wishes to redeem or purchase a piece of property is being required to pay a higher amount, because of the additional taxes and interest accruing. This is clearly not the intent of the West Virginia Code, which is to make the auditor's office merely a conduit through which the taxes on such lands might be collected or sold at a land sale to achieve the statutory purpose of passing title to a more responsible owner. As one is probably aware of, there is approximately 17,000 pieces of property that remain unacted upon by the deputy commissioners in the various fifty-five counties. It is not the intention of the Auditor's Office to act upon all 17,000, but only to deal with the ones that we receive requests upon. Furthermore, prior to the State Auditor appointing a member of his staff as special deputy commissioner, the current deputy commissioner would have an opportunity to comply with their statutory responsibilities. One may ask the question, why not replace the deputy commissioner with a new one. In most counties, that is not a practical solution, because of several factors. The chief one being that it is impossible to find a qualified attorney to take the position, because of the amount of work involved in conducting a delinquent land suit and the low pay involved. (\$10.00 + 15% on each sale or \$10.00 + 15% of the total taxes and interest due). Even in cases where the State Auditor might be able to appoint a new deputy commissioner, it would still take time before they would be familiar with the Code in order to file suit. This delay would be expensive to the individuals redeeming their property. Even in those cases, where a new deputy commissioner would be appointed, it would be better to have a member of the State Auditor's Office staff familiar with the statutes to go ahead and serve as special deputy commissioner while the new deputy commissioner becomes acclimated to the position.

Furthermore, State law places a legal duty on the Auditor to sell delinquent lands by appointing deputy commissioners to conduct public sales. Since deputy commissioners have been refusing to conduct such sales, the Auditor is placed in a position of non-compliance with State law. This non-compliance causes expenses to the taxpayers by forcing them unnecessarily to file lawsuits so property may be sold or redeemed.

For the foregoing reasons, this proposed Legislative rule is necessary for the immediate preservation of public welfare and to prevent substantial harm to the public interest.

The sole purpose of this rule is to allow the State Auditor's Office to serve the citizens of West Virginia in accordance with State Law.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Appointment of Special Deputy Commissioner of Forfeited and Delinquent Lands

Type of Rule: X Legislative          Interpretive          Procedural

Division of Forfeited and Delinquent Lands  
 Agency: State Auditor's Office Address Building 1, Room 212-W,  
1900 Kanawha Boulevard, East, Charleston, WV 25305

1. Effect of Proposed Rule:	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	N/A	N/A	N/A	N/A	N/A
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

This rule is a revenue enhancement with no increase cost to the Auditor's Office.

3. Objectives of these rules:

To better serve the citizens of West Virginia.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Monies that are received by the special deputy commissioner as compensation for his services will be deposited into the special operating fund of the Auditor's Office.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

The Sheriff and Treasurer of the counties will receive their portion of taxes and interest quicker, as well as making the property tax producing.

C. Economic Impact on Citizens/Public at Large.

It will decrease the amount required by the individual to redeem their property.

Date: 4 November 1992

Signature of Agency Head or Authorized Representative

Allen B. Gainer

DATE: November 5, 1992

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Glen B. Gainer, Jr., State Auditor

EMERGENCY RULE TITLE: Appointment of Special Deputy Commissioner  
of Forfeited and Delinquent Lands.

1. Date of filing: November 5, 1992
2. Statutory authority for promulgating the emergency rule:  
W.Va. Code 11A-4-5; State Human Rights Commission v. Pauley,  
212 S.E.2d 77(1975)
3. Date of filing of proposed legislative rule: 11-5-92
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
NO.
5. Has the same or similar emergency rule previously been filed and expired?  
NO.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare  
SEE ATTACHED SHEET.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

NO.

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

SEE ATTACHED SHEET.

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**FILED**

Ringer, Cavender & Stiller  
Attorneys at Law  
Associates  
214 Wall Street  
Morgantown, West Virginia 26505

DEC 8 10 44 AM '92

Darrell W. Ringer  
David L. Cavender  
Patricia H. Stiller

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

304-292-3366  
304-292-6126 FAX

November 11, 1992

Russell Rollyson, Director  
Land Division  
State Auditor's Office  
Building 1, Room W212  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0238

**RECEIVED**

NOV 16 1992

A. J. RICE

RE: Comments on Title 155, Series 1,  
Emergency Legislative Rule - Appointment of  
Special Deputy Commissioner of  
Forfeited and Delinquent Lands

Dear Mr. Rollyson:

This letter is provided as the undersigned's comments upon the above proposed Legislative Rule. I ask that it be accepted as such, and made a part of the public hearing record.

I have served as Deputy Commissioner of Forfeited and Delinquent Lands for Monongalia County since (about) 1981. During that time, I have handled at least one delinquent land lawsuit per year, and dozens, if not hundreds of forfeited and delinquent land certifications. I suggest that the provisions of the proposed Legislative Rule be amended to allow the Auditor to appoint any active Deputy Commissioner to serve as Special Deputy for any County in which he/she does not otherwise serve.

The purpose of this suggestion is to allow the Auditor to utilize the services of those Deputy Commissioners who are in place, and experienced in such matters. Many of us have developed computerized systems for the handling of delinquent land matters, including the calculation of the necessary taxes and fees, which dramatically reduce the effort necessary to process delinquent land certifications.

Additionally, in my experience, the filing of a delinquent land lawsuit results in a relatively large number of inquiries concerning the nature of the tracts or parcels involved, the identity of the owners, claimants and/or lien holders, and which, from time to time, equitably require the Deputy Commissioner to sit down with the inquiring party to discuss the entire delinquent land process.

HB

TELEPHONE  
(412) 228-8811

HADDAD AND BROOKS, INC.

905 WASHINGTON ROAD  
P.O. BOX 714  
WASHINGTON, PENNSYLVANIA 15301-1153

November 3, 1992

RECEIVED

NOV 06 1992

AUDITORS OFFICE  
LAND DIVISION

Mr. Ken Hechler  
Secretary of State  
State of West Virginia  
Building 1, Suite 157-K  
Charleston, WV 25305

Dear Mr. Secretary:

For many years Haddad and Brooks has drilled oil and gas wells in the State of West Virginia, both for our account and for clients as Mobay Chemical Corporation and PPG. We at Haddad and Brooks believe that there are special and excellent prospects for drilling oil and gas wells in Wetzel County. However, our operations are greatly hindered by oil and gas interests which had gone delinquent and were "Sold to the State".

We realize that there are laws written to appropriate these delinquent properties and generate income to the State, but in Wetzel County for the last few years, we have found it nearly impossible to get the Deputy Commissioner to hold any tax sales. This inaction not only deprives the State and County of badly needed money, but has delayed drilling plans, which further divest the State and County of more revenue through lost jobs and significant taxes.

It is our understanding that recommendations are forthcoming to you to allow the State Auditor's office to proceed with tax sales on behalf of the State when a Deputy Commissioner of a given county fails to cause a tax sale. We strongly recommend that some changes be implemented so as to eliminate any future hindrance in generating revenues and employment for the State.

Yours very truly,

HADDAD AND BROOKS, INC.

Richard Y. Haddad, President

Jerrold J. Hopkins, PE  
Manager of Operations

Koula Digby  
Land Manager

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Dec 8 10 44 AM '92

FILED

RYH:KD

FILED

DEC 8 10 44 AM '92

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Forfeited and Delinquent Land Emergency Rule  
December 7, 1992  
Russell Rollyson

Mr. Rollyson: There comes on for hearing the proposal of the Commissioner of Forfeited and Delinquent Land (the State Auditor) to provide interested persons an opportunity to present views and comments in the matter of the Rule issued on November 5, 1992. Notice of the proposed hearing was posted in each county courthouse in West Virginia. It is now 10:30 a.m., December 7, 1992 in Room W-100, State Capitol Building, Charleston, West Virginia. No one is here for such hearing. There being nothing further on this matter, the hearing is adjourned.



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Russell Rollyson  
Director of Forfeited and Delinquent  
Land

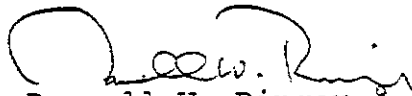
RUSSELL ROLLYSON, DIRECTOR  
Page Two  
November 11, 1992

Although an employee of the Auditor's may well be (and probably is) qualified to provide the "bookkeeping" services required of a Deputy Commissioner, I strongly recommend that, if possible, an individual in the general geographic area as the property involved be assigned.

If you, any member of the Auditor's staff, or any other involved individuals have any questions concerning the suggestions set forth in this letter, I would be happy to discuss them by telephone, or in person if appropriate.

Thank you for your consideration of these comments.

Sincerely,



Darrell W. Ringer,  
Deputy Commissioner  
Forfeited and Delinquent  
Lands for Monongalia County

DWR/jsb

RECEIVED

NOV 16 1992

AUDITOR  
LAND DIVISION

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

DEC 8 10 44 AM '92

FILED

FROM: Dallas R. Trembly  
8820 Carlisle Road  
Wellsville, PA, 17365-9741

DATE: October 31, 1992

TO: Mr. Russ Rollyson  
WV State Auditors Office  
Charleston, WV 25301

RECEIVED

NOV 05 1992

AUDITORS OFFICE  
LAND DIVISION

Mr. Rollyson,

I want to thank you for your time in the matter of Mark Sergeant neglecting to complete his duties relating to the Clair E. Gross property. However, to this date, I have not seen any action from Mark.

I had thought from the firmness of your letter that he would move on the problem. But, I was wrong. Is there any way that you can take over the proceedings and I will pay the back taxes directly to your office?

As I showed you while I was there, I have done a lot of the work for Mark and I have some money invested. Somehow, I would like to get this completed.

Please advise me of what I should do now. I am sort of at a loss of direction now.

Thank You



Dallas R. Trembly



STATE OF WEST VIRGINIA

STATE AUDITOR'S OFFICE

Land Division  
Building 1 Room W212  
1900 Kanawha Boulevard East  
Charleston WV 25305-0230

GLEN B. GAINER, JR.  
STATE AUDITOR  
AND  
COMMISSIONER OF FORFEITED  
AND DELINQUENT LANDS

RUSSELL ROLLYSON  
DIRECTOR LAND DEPARTMENT

RUTH ANN WITHERELL  
ASSISTANT DIRECTOR

AREA CODE 304  
PHONE

558-2262

September 8, 1992

Honorable Mark Sergent  
Deputy Commissioner  
Forfeited and Delinquent Lands  
P O Box 626  
Spencer, WV 25276

Re: Roane Co - Reedy Dist  
Gross, Clair E II  
Lot Buffalo N  
Certification Number 2169

Dear Mr. Sergent:

The State Auditor's Office recently received a request from Dallas Trembly asking that you bring action in Circuit Court of Roane County regarding the above-captioned property so he might be able to redeem it.

Mr. Trembly, as I was informed by him, has discussed the matter with your office. Furthermore, his attorney Orton Jones, has gone so far as to draw up the required orders for your signature. The property, as you know, was certified to you on September 30, 1988.

In that light, Chapter 11A, Article 4, Section 10 of the West Virginia Code states, "As soon as possible after receipt of the certified list, the Deputy Commissioner shall institute in the Circuit Court of his county, a suit or suits in chancery, in the name of the State of West Virginia, for the sale for benefit of the school fund of all the lands included in the list."

Thus, I'm making a request that you bring action against certification number 2169 as soon as possible. Could you please notify this office as soon as you make a determination on when that might be.

Honorable Mark Sargent  
September 8, 1992  
Page Two

Thank you for your prompt attention to this matter. If  
you have any questions, please let me know.

Sincerely,

Russell Rollyson  
Director  
Land Division

RR/js

cc: Dallas R. Trembly

HB

TELEPHONE  
(412) 228-8811

HADDAD AND BROOKS, INC.

905 WASHINGTON ROAD  
P.O. BOX 714  
WASHINGTON, PENNSYLVANIA 15301-1153

November 3, 1992

RECEIVED

Mr. Ken Hechler  
Secretary of State  
State of West Virginia  
Building 1, Suite 157-K  
Charleston, WV 25305

NOV 06 1992

AUDITORS OFFICE  
LAND DIVISION

Dear Mr. Secretary:

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We realize that there are laws written to appropriate these delinquent properties and generate income to the State, but in Wetzel County for the last few years, we have found it nearly impossible to get the Deputy Commissioner to hold any tax sales. This inaction not only deprives the State and County of badly needed money, but has delayed drilling plans, which further divest the State and County of more revenue through lost jobs and significant taxes.

It is our understanding that recommendations are forthcoming to you to allow the State Auditor's office to proceed with tax sales on behalf of the State when a Deputy Commissioner of a given county fails to cause a tax sale. We strongly recommend that some changes be implemented so as to eliminate any future hindrance in generating revenues and employment for the State.

Yours very truly,

HADDAD AND BROOKS, INC.

Richard Y. Haddad, President

Jerrold J. Hopkins, PE  
Manager of Operations

Koula Digby  
Land Manager

RYH:KD

GEOLOGY, GEOPHYSICS, EXPLORATION AND DEVELOPMENT MANAGEMENT

STATE OF West Virginia HUMAN RIGHTS COMMISSION, etc.

Edith M. PAULEY, No. 12473.

Supreme Court of Appeals of West Virginia. Feb. 18, 1975.

incidental relief in connection with subject delegable to it, ultimate judicial review thereof being available.

4. Civil Rights 222-65 On proof of monetary loss, Human Rights Commission may make award of compensatory damages to victim of unlawful discrimination as defined in Human Rights Act. Code, 5-11-1 et seq.

5. Civil Rights 222-66 Human Rights Commission's award of compensatory damages to victim of unlawful discrimination is subject to judicial review. Code, 5-11-1 et seq.

6. Civil Rights 222-65 Where victim of racial discrimination proved no monetary loss from discrimination in refusing to rent apartment to him, he was not entitled to damages under Human Rights Act. Code, 5-11-1 et seq.

Syllabus by the Court Under the authority granted by the Human Rights Act, as provided in W.Va. Code, 1961, 5-11-1 et seq., as amended, the Human Rights Commission may make an award of monetary damages to a victim of unlawful discrimination as defined in that Act.

2. Under the provisions of the Human Rights Act compensatory damages may be awarded only upon proof of monetary loss.

Franklin D. Cheekley, Sp. Asst. Atty. Gen., Morgantown; Guy R. Bucci, Sp. Asst. Atty. Gen., Charleston, for appellant. John H. Reed, Jr., South Charleston, for appellee.

CAYLAN, Justice: The principal issue to be determined on this appeal is whether the West Virginia Human Rights Commission has the statu-

The Human Rights Commission appealed from an order of the Circuit Court, Kanawha County, Frank L. Taylor, J., which held that the Commission had no statutory authority to award monetary damages to a victim of racial discrimination. The Supreme Court of Appeals, Caplan, J., held that the Human Rights Commission could make an award of compensatory damages to a victim of unlawful discrimination upon proof of monetary loss, but that where the victim of racial discrimination did not incur any monetary loss, he was not entitled to damages.

Affirmed in part and reversed in part Berry, J., dissented and filed opinion.

1. Administrative Law and Procedure 222-305

Administrative agency can exert only such powers as those granted by legislature and if such agency exceeds its statutory authority, its action may be nullified by court.

2. Administrative Law and Procedure 222-325

Administrative agency possesses, in addition to powers expressly conferred by statute, such powers as are reasonably and necessarily implied in exercise of its duties in accomplishing purposes of legislative act which established agency.

3. Administrative Law and Procedure 222-222

Legislature may authorize administrative agency to award money damages as

defendants. The existence of a conflict of interest, to warrant the result here sought, must be founded on something more than mere speculation or surmise. We perceive nothing in this record which demonstrates the existence of any real conflict of interest between the defendants." *Id.*, at 1194.

[9] The foregoing authorities serve to illustrate that actual conflict must occur before a court is warranted in declaring a conviction void by reason of ineffective assistance of counsel. Those authorities do not minimize the law's or this Court's abhorrence of actual conflict arising from joint representation. Where such is evident the modern decisions are uniform in condemning joint representation which results in conflict; when found, prejudice is presumed. See *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Sawyer v. Brough*, 338 F.2d 70 (4th Cir. 1966); *Craig v. United States*, 217 F.2d 355 (4th Cir. 1954); *Holland v. Bokes*, 225 F.Supp. 843 (N.D.W.Va.1963); *Annot.*, 34 A.L.R.3d 470 (1970). See also, 21 Am.Jur.2d Criminal Law § 319 (1968).

Fully recognizing the import of actual conflict of interests in representation of accused, this Court, nevertheless, continues to recognize the threshold premise displosive in *State ex rel. Favors v. Tucker*, 143 W.Va. 190, 100 S.E.2d 411 (1957), cert. den. 357 U.S. 908, 78 S.Ct. 1183, 2 L.Ed.2d 1183 (1968). There, we held:

"The appointment by a trial court of the same attorney to represent two defendants indicted for the commission of the same crime is not in itself improper unless the facts and circumstances show that the interests of the two defendants are in conflict. . . ." Part syllabus point 2. *Id.*

[8] Thus, we return to a point of critical significance in a case charging ineffective assistance of counsel. Although ultimately unsuccessful, employment of the consistent defense strategy, maintaining total innocence through "joint effort" and present-

tion at trial, cannot be ignored by this Court when such was pursued by experienced trial counsel. The option presented to the Court is whether defendants' conviction of the felony of receiving stolen property occurred despite considered trial strategy, tactics and arguable course of action, voluntarily and understandingly consented to by the accused, or because of involuntary and uninformed acquiescence to joint representation resulting in conflict prejudicing one or both of the defendants. We conclude for the former.

[7.9] The distinction between trial strategy gone awry and ineffective assistance of counsel was recently formulated and approved by this Court. That standard, one of which that may be employed to assess constitutionally required effectiveness of counsel, controls the holding of this appeal:

"Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics or arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." *Syllabus* point 21, *State v. Thomas*, W.Va., 203 S.E.2d 445 (1974).

In the trial below, the circuit court failed to consider those facts which demonstrated the strategy of counsel whose performance was attacked. His findings were plainly wrong and must be reversed. *Syllabus* point 3, *State ex rel. Pringle v. Conner*, *supra*.

Accordingly, the decision of the Circuit Court of Wood County and the order discharging the appellees from constructive custody must be reversed, and the writ discharged. Reversed.



ty authority under the Human Rights Act and set out in W.Va.Code, 1931, 5-11-1 of her, as amended, to make an award of monetary damages to a victim of unlawful discrimination as defined in that Act. A secondary issue is whether the award of monetary damages made by the West Virginia Human Rights Commission in this case is supported by the evidence.

This is an appeal by the West Virginia Human Rights Commission, hereinafter sometimes referred to as Commission, from a final order of the Circuit Court of Kanawha County. The proceeding in that court was instituted by Edith M. Pauley pursuant to the provisions of Section 4 of the State Administrative Procedures Act, as embodied in W.Va.Code 1931, 29A-5, as amended, for the purpose of reviewing the decision and order of the Commission. The hearing before the Commission was upon a complaint charging Edith M. Pauley with discrimination because of race. The Commission found Mrs. Pauley guilty of discrimination and imposed damages in the sum of \$490.00 as compensation for time and effort expended in finding suitable housing; \$100.00 as compensation for embarrassment and loss of personal dignity; and \$100.00 as exemplary damages for the alleged misconduct of the respondent.

The circuit court affirmed the findings and decision of the Commission which held that Mrs. Pauley had discriminated against Charles Robinson in refusing to rent an apartment to him. It reversed the Commission, however, in its award of monetary damages, holding that the Commission had no statutory authority to make such award. The Commission prosecutes this appeal, seeking an adjudication of the question as to whether it has lawful authority to make an award of monetary damages.

It is not deemed necessary on this appeal to consider the facts in any great detail. Suffice to note that the complainant before the Commission, Charles Robinson, in answer to an advertisement in a newspaper approached Edith M. Pauley in an effort to rent an apartment. Mr. Robinson is black

and his wife is white. According to the transcript of the testimony Mrs. Pauley told Mr. Robinson that she would study his references but indicated that they could have the apartment. Subsequently, however, she refused to rent the apartment to them. She told Mrs. Robinson that she could not rent to them because of the interracial marriage. This factual situation gave rise to the proceedings below and posed the questions set out in the first paragraph of this opinion.

[1, 2] It is readily acknowledged that the West Virginia Human Rights Act does not expressly authorize the Commission to make a monetary award of damages to a victim of unlawful discrimination. It is also acknowledged that an administrative agency such as the Human Rights Commission can exert only such powers as those granted by the Legislature and that if such agency exceeds its statutory authority, its action may be nullified by a court. A further sound principle of law, as reflected by many decisions of this Court and other authorities, is that an administrative agency possesses, in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act. *Cobrin v. State Workmen's Compensation Commissioner*, 134 W.Va. 280, 175 S.E.2d 186 (1970); *Mohr v. County Court of Cabell County*, 145 W.Va. 377, 116 S.E.2d 896 (1960). See *Wilhite v. Public Service Commission of West Virginia*, 150 W.Va. 747, 149 S.E.2d 279 (1966); 1 Am.Jur.2d, Administrative Law, §§ 44 and 70.

We are confronted with the question, one of first impression in this jurisdiction, of whether the Legislature intended to grant to the West Virginia Human Rights Commission the power to award damages to victims of unlawful discrimination. "The court is not limited to the mere words of a statute or what is expressly declared therein, and that which is incidentally necessary to a full exposition of the legislative intent

should be upheld as being germane to the law. An administrative agency which is indispensable to the powers exercised but indicated that they could have the apartment. Subsequently, however, she refused to rent the apartment to them. She told Mrs. Robinson that she could not rent to them because of the interracial marriage. This factual situation gave rise to the proceedings below and posed the questions presented.

Human rights legislation is of relatively recent origin in this state but, as reflected by subsequent amendments thereof, the development of such legislation has been fairly rapid and has demonstrated on the part of the Legislature an intention to effectively cope with social problems arising from the practice of unfair discrimination.

The Human Rights Commission was first created in this state by an Act of the Legislature in 1961. The extent of the Commission's power was expressed in Section 1 of that Act as follows: "The commission shall encourage and endeavor to bring about mutual understanding and respect among all racial, religious and ethnic groups within the state and shall strive to eliminate all discrimination in employment and places of public accommodation by virtue of race, creed or religious belief." No enforcement power was given to the Commission by that Act, the effect being that it was a token expression of disapproval of unfair discrimination.

Compare that Act with its replacement, Chapter 89, Acts of the Legislature, Regular Session, 1967, now embodied in W.Va. Code, 1931, 5-11-1 through 19, as amended. Where the former Act merely permitted the Commission to encourage understanding between various groups, the latter expressly declares certain discriminatory practices to be unlawful (W.Va.Code, 1931, 5-11-9, as amended) and provides procedures whereby the Commission will effectuate the purposes of the Act (W.Va.Code, 1931, 5-11-10, as amended). Furthermore, the 1967 Act and the amendments thereto contain a strong declaration of policy: W.Va.Code, 1931, 5-

11-2, as amended. Therein, the Legislature declared it to be the public policy of the State of West Virginia to provide all of its citizens "equal opportunity for employment, equal access to places of public accommodation, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property." The Legislature further declared equal opportunity in the areas of employment, public accommodations, housing accommodations and real property to be a human or civil right of all persons without regard to race, religion, color, national origin or ancestry. In addition to the foregoing, the present Human Rights Act, unlike the 1961 Act, provides for meaningful measures for the enforcement of the Commission's orders.

Thus, it is readily discernible that the Legislature, by its recent enactments in the field of human rights, intended to and did provide the Commission the means with which to effectively enforce the law and meaningfully implement the legislative declaration of policy. If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. The forceful language used by the Legislature mandates the eradication of unlawful discrimination. If this mandate is to be carried to fruition the provisions of the 1967 Human Rights Act and the amendments thereto must be given the significance intended so as to provide for meaningful enforcement.

[3] As a preliminary consideration, in relation to the question of whether an administrative agency has the power to award damages to a victim of unlawful discrimination, we quote with approval the expression of the New Jersey Supreme Court, as follows: "Initially we may say that, at this advanced date in the development of administrative law, we see no constitutional

objection to legislative authorization to an administrative agency to award, as incidental relief in connection with a subject matter to it, money damages, ultimate judicial review thereof being available." *Jackson v. Concord Company*, 54 N.J. 113, 253 A.2d 733 (1969). Cf. *Massachusetts Commission Against Discrimination v. Finnanzoli*, 557 Mass. 112, 256 N.E.2d 311 (1970); *Gilliam v. City of Omaha*, D.C.Neb., 331 F.Supp. 4 (1971).

[4] Finding no constitutional objection to legislative authorization of such an award by an administrative agency, we must now determine whether the Commission is authorized under our Human Rights Act to make such award. Our basic determination must be whether the Legislature intended to extend such power to the Commission, even though it was not granted in express words. A careful examination of the provisions of W.Va.Code, 1931, 5-11-1 et seq., as amended, with particular reference to Section 10 thereof, leads us to believe that such power was given by implication, considering the broad language and overall design of the Act.

Section 10 of the Act provides the procedure to be followed when a complaint is filed with the Commission charging unlawful discrimination. If, upon investigation of the charges, the Commission determines that probable cause exists for substantializing the allegations of the complaint, it will endeavor by conference, conciliation and persuasion to eliminate such unlawful practices. Should this prove ineffective, the Commission may, upon proper notice, hold a hearing at which all parties may be heard. Upon a finding that the respondent has engaged in an unlawful discriminatory practice, the Commission shall issue and cause to be served an order to cease and desist from such unlawful discriminatory practices.

Significantly, the above code provision then authorizes the Commission, in addition to the authority to issue a cease and desist order, "to take such affirmative action, in-

cluding, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay . . . as in the judgment of the commission, will effectuate the purposes of this article . . ." (emphasis supplied). Identical language is found in the New Jersey human rights act (N.J.S.A. 10-5-17), which, like our Act, incidentally, does not expressly give the Director of the Division on Civil Rights the authority to award damages to victims of unlawful discrimination. Nonetheless, the court in *Jackson v. Concord Company*, *supra*, had no difficulty in finding a plain implication in the New Jersey Statute authorizing the Director to award such damages.

The term "including" in a statute is to be dealt with as a word of enlargement and this is especially so where, as in our Section 10, such word is followed by "but not limited to" or the illustrations given. *Pennsylvania Human Relations Commission v. Albrecht Park Cemetery Association*, 453 Pa. 124, 306 A.2d 884 (1973). See *F. P. G. v. Corporation Commission of State of Oklahoma*, D.C.Okla., 382 F.Supp. 522 (1972); *Phelps v. Sheld, Ky.*, 478 S.W.2d 684 (1972); *and St. Louis County v. State Highway Commission*, Mo., 409 S.W.2d 149 (1966).

[5] W.Va.Code, 1931, 6-11-10, as amended, enumerates, as illustrations, several courses of action the Commission can take to "effectuate the purposes of this article." As noted above, however, by the use of the term "including, but not limited to," the Legislature implies that measures, other than those specified, may be taken by the Commission in order to effectively carry out the purposes of the Act. We believe that the Legislature intended, as a further measure, that the Commission have the authority to award money damages when warranted by the evidence, such award being always subject to judicial review.

Under the provisions of Section 10 of our Human Rights Act, the Commission is specifically authorized to order the offending party in an employment discrimination case to reinstate the employee "with or without

back pay". This shows that an award of money damages for economic loss was not a remedy unthought of by the Legislature. In this respect, at least, the Commission was expressly given the authority to consider economic loss to the victim of unlawful discrimination. *Jackson v. Concord Company*, *supra*; Cf. *National Labor Relations Board v. Strong*, 393 U.S. 357, 89 S.Ct. 541, 21 L.Ed.2d 546 (1969).

A further indication that the Legislature intended to authorize the Commission to award money damages in proceedings before it is found in W.Va.Code, 1931, 5-11-13, as amended, designated "Exclusiveness of remedy". Therein, it is provided that when one proceeds under that article, such action is exclusive and one may not take any other action, either civil or criminal. Experience has shown that in cases involving unlawful discrimination, whether it be in the field of employment, housing accommodations or other, the victim thereof often suffers "out of pocket" monetary loss. Fairness requires and justice demands that he be permitted to recover such loss. This he is precluded from doing if the remedy before the Commission does not allow the award of money damages.

We recognize, as did the learned trial judge, that there is no unanimity of decision among the courts on the issue under consideration. We believe, however, that those which permit the Human Rights Commission to award money damages when warranted by the evidence are better reasoned decisions and we adhere thereto. See *Jackson v. Concord Company*, *supra*; *Zabran v. Russell Pitt Real Estate Agency*, 62 N.J. 399, 391 A.2d 754 (1973); and *Gilliam v. City of Omaha*, *supra*. *Contra*, see *Iron Workers Local v. Hart and Iowa Civil Rights Commission* (Iowa), 191 N.W.2d 758 (1971).

[6] In relation to the secondary issue, referred to in the first paragraph of this opinion, we are in agreement with the trial court, and affirm its ruling. The record fails to reveal that the complainant, Charles

Robinson, incurred any monetary loss. The Commission appears to have based its award of damages on its earnings per hour. However, since the record shows affirmatively that he lost no work by reason of this matter, he is entitled to no damages. Compensatory damages may be awarded by the Commission only upon proper proof of monetary loss. No such loss was shown in this case.

In view of the foregoing the judgment of the Circuit Court of Kanawha County is reversed insofar as it holds that the West Virginia Human Rights Commission is without authority to award compensatory damages to a victim of unlawful discrimination and it is affirmed wherein it denies such compensatory damages and other monetary awards to the complainant in this case. Affirmed in part; reversed in part.

#### BERRY, Justice (dissenting):

I dissent from the majority opinion wherein it states that the West Virginia Human Rights Commission has authority under the statute creating it to award compensatory damages to a victim of unlawful discrimination. There is no authority provided for in the West Virginia Human Rights Act (Code, 5-11-1 et seq.), or amendments thereto, authorizing the Commission to award compensatory damages. It does specifically provide that the Commission can reinstate employees, with or without back pay. It is true this authorization may involve a monetary award, but such awards have specific limitations whereas the majority holds that the Commission has the power and authority to make awards for compensatory damages with no limit to the amount that may be awarded. The maxim of expression minus est exclusio alterius (the expression of one thing is the exclusion of another) is applicable in the construction of this statute.

I am of the opinion that authority to award compensatory damages by the Commission under the act would have to be specifically granted by the legislature with

certain limitations set out in connection therewith.



cut a bond in blank and gave it to clerk who certified the same, appellant could reasonably have expected clerk to fill in the blanks and there was substantial compliance in giving bond so that appeal was not subject to dismissal for failure to post bond within two months from date appeal was lodged. Code, §§ 5-5-16.

Roosevelt DAWSON

Syllabus by the Court

CANTEEN CORP., a corp., and Continental Baking Co., a corp.  
No. 13476.

Supreme Court of Appeals of West Virginia.  
Feb. 25, 1975.

Action was brought by buyer and consumer of contaminated food against vendor, machine company and baking company which baked bun used in the contaminated cheeseburger. The canteen company was dismissed and the Circuit Court of Brooke County, James G. McClure, J., entered order dismissing the baking company on ground of lack of privity, and the plaintiff buyer appealed. The Supreme Court of Appeals, Neely, J., held that the doctrine of privity of contract in action for breach of express or implied warranty was abolished and that the execution of appeal bond in blank was sufficient.

Reversed and remanded with instructions.

1. Sales — 255

Privity of contract in actions grounded in breach of express or implied warranty is abolished. Code, 46-2-318, 46A-6-108.

2. Appeal and Error — 395

Where counsel for appellant and the attorney in fact for insurance company executed a bond in blank and gave it to clerk who certified the same, appellant could reasonably have expected clerk to fill in the blanks and there was substantial compliance in giving bond so that appeal was not subject to dismissal for failure to post bond within two months from date appeal was lodged. Code, §§ 5-5-16.

The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished.

Patrick S. Cassidy, Wheeling, Bagnard & Robertson, Martin S. Bagnard, Weirton, Myron E. Ransin, Jr., Steubenville, Ohio, for appellant.

Bachmann, Hess, Bachmann & Garden, Gilbert S. Bachmann and Lester C. Hess, Jr., Wheeling, for Continental Baking Co.

NEELY, Justice:

For many years West Virginians suffering injuries as the result of defective products have been unable to recover against defendant manufacturers, wholesalers, or retailers for breach of warranty unless they stood in privity of contract with the defendant. At the same time West Virginia manufacturers, wholesalers and retailers selling products nationally have been exposed to extensive liability for defective products manufactured in this State and sold elsewhere because the majority of American jurisdictions have abolished privity as a requirement in warranty actions.

[1] The case before us provides an opportunity for the Court to correct this anomalous situation and to bring West Virginia law into harmony with the clear weight of modern American authority. Accordingly the requirement of privity of Products Liability in West Virginia," 74 W.Va.L.Rev. 283 (1972).

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contract in actions grounded in breach of express or implied warranty is abolished in West Virginia and the holding in the case of Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964) and the cases upon which it relied are expressly overruled where inconsistent with the holding in this case.

case 2

The plaintiff, Roosevelt Dawson, was working for the Wheeling-Pittsburgh Steel Corporation on July 12, 1970, when he purchased from a vending machine a cheeseburger prepared on a bun containing mice feces. The bun had been baked by defendant, Continental Baking Company. Plaintiff brought his action in the Circuit Court of Brooke County, West Virginia, against defendant Canteen Corporation and Continental Baking Co. The plaintiff has submitted evidence that "the defendant has suffered as a proximate result of the defendant's conduct acute food poisoning with Gastroenteritis. The defendant's implied warranty the cheeseburger including the bun warrant the cheeseburger and bun ready was that the cheeseburger and bun was fit for human consumption." Plaintiff alleged that he suffered nausea, vomiting, and diarrhea; that he remained ill for over a month as a proximate result of eating the contaminated cheeseburger; that he expended money for medical care; and, that he lost a month's wages from his regular employment.

Canteen Corporation moved to dismiss the action as to itself because Canteen did not operate the vending machine but rather leased it to Canteen of Ohio Valley, and the court granted that motion to dismiss. The court granted that motion to dismiss.

2. The holding in Payne v. Valley Motor Sales, Inc., 146 W. Va. 1063, 124 S.E.2d 622 (1962), another decision commonly cited as precedent in West Virginia cases dealing with warranty issues, also has been substantially limited. Passage of the Consumer Protection Act, W.Va. Code, 46A-1-101 et seq. (1974) restricted the Payne decision which stated in syllabus point 1 that "[e]ffect will be given to an express warranty as written where it specifically excludes implied warranties and limits amount of damages." But, W.Va. Code, 46A-6-107 (1974), now provides:

lower court's dismissal of Canteen is not challenged on appeal.

Continental Baking Company also filed a motion to dismiss on the grounds that there was no contract privity between Continental Baking and the plaintiff. This motion to dismiss for lack of privity was granted based upon pretrial stipulations. It is the dismissal for lack of privity which is squarely challenged by plaintiff on this appeal.

1

The requirement of privity of contract in warranty actions in West Virginia began to erode with the passage of the Uniform Commercial Code. W.Va. Code, 46-2-318 [1963] eliminated the privity of contract requirement for warranty actions in what is known as the "horizontal" chain of users. That section says:

"A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

This process of statutory erosion of the common law doctrine continued with the passage of the "West Virginia Consumer Credit and Protection Act," Chapter 12, Acts of the Legislature, Regular Session,

"Notwithstanding any other provision of law to the contrary with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall: (1) Exclude, modify or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose; or (2) Exclude, modify or attempt to limit any remedy provided by law, including for the measure of damages available, for breach of warranty, express or implied.