

# **Adjudicating Discrimination Complaints: Comparing the Process in Pennsylvania and West Virginia**

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# Who We Are

- ▶ **Darlene Hemerka** has been a Hearing Examiner with the PHRC since 2022. Prior to the joining the Commission, she represented plaintiffs in housing and education cases
- ▶ Prior to joining the PHRC in 2023, **Tamara Shehadeh-Cope** represented asylees and undocumented and noncitizen crime victims before the Departments of Justice and Homeland Security
- ▶ **C. Joan Parker** joined the WVHRC as the Administrative Law Judge in January 2022 after having spent over a decade litigating discrimination cases

# Objectives

- ▶ Review the process of initiating a discrimination case
- ▶ Briefly discuss the investigation process
- ▶ Identify the steps in adjudicating discrimination cases in Pennsylvania and West Virginia
- ▶ Discuss the similarities and differences in these processes in the two states
- ▶ Provide best practices when presenting a discrimination case before a Commission

# Governing Laws in Pennsylvania

## **PHRA**

The Pennsylvania Human Relations Act (PHRA) covers discrimination in employment, housing, commercial property, education, and public accommodations

## **PFEEOA**

The Pennsylvania Fair Educational Opportunities Act (PFEEOA) is specific to postsecondary education and secondary vocational and trade schools

# Governing Laws in West Virginia

## **WVHRA and PWFA**

The West Virginia Human Rights Act (WVHRA) prohibits discrimination in employment and public accommodations. The West Virginia Pregnant Workers Fairness Act (WVPWFA) prohibits employment discrimination against persons who are experiencing pregnancy, related medical conditions, and childbirth

## **WVHRA**

The West Virginia Fair Housing Act (WVHRA) prohibits discrimination in the rental, sale, or mortgage financing of housing

# Sectors Covered Under the PHRA

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1. Employment - seeking, obtaining or holding a position

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2. Education - attending public or private school, college, trade school or university

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3. Housing - renting, purchasing, selling or obtaining a loan for a home

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4. Commercial Property - having access to or the purchase, sale or lease of commercial property

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5. Public Accommodations - access to public places or services

# Sectors Covered Under the WVHRA and WVFHA

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1. Employment - Compensation, hire, tenure, terms, conditions or privileges of employment, and discrimination against persons who are experiencing pregnancy, related medical conditions, and childbirth; reasonable accommodation for disabilities, religion, and pregnancy/childbirth

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  2. Housing – Rental, sale, mortgage financing, and other housing related transactions; accessibility in design and construction

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  3. Public Accommodations - Access to accommodations, advantages, facilities, privileges or services of the place of public accommodations, including state and local government facilities/services (except jails and prisons for inmates, but covered for visitors)

# Protected Classes in PA

In general, Pennsylvania law prohibits discrimination based on:

- Ancestry
- Retaliation
- Disability
- Use, handling & training of support/services animal for disability
- Age (40+)
- National Origin
- Religion
- Familial Status (housing only)
- Sex
- Color
- Race



# Protected Classes in WV

In general, West Virginia law prohibits discrimination based on:

- Ancestry
- Reprisal
- Disability or Blindness
- Sex (including sexual orientation and gender identity)
- Age (40+ - Employment and public accommodation only)
- Pregnancy, Childbirth, and Related Medical Conditions (Employment only under WVPWFA)
- National Origin
- Religion
- Familial Status (housing only)
- Color
- Race

# Functions & Structure of the PHRC and the WVHRC

The HRCs must

- ▶ Investigate complaints of discrimination
- ▶ Litigate cases of discrimination\*
- ▶ Adjudicate (decide) cases of discrimination

**Each of these functions must be performed by separate staff**

- ▶ The Office of the Hearing Examiner performs the PHRC's adjudicatory function
- ▶ The Office of Judges performs the WVHRC's adjudicatory function

# Overview of the Processes

- ▶ If an individual feels that they have been the victim of illegal discrimination, they should file a Complaint with the HRCs. The statute of limitations varies between jurisdictions\*
- ▶ HRC staff will investigate the Complaint and HRC counsel will serve as counsel for the Complainant in PA. The WV Attorney General's Office (AGO) prosecutes the Complaint and represents the HRC at public hearing
- ▶ Complainants do not incur any attorney fees during the investigation process from the HRCs. Complainants do have the right to obtain private legal services at their own expense, but this is not required

# Note About Dual Filed Cases

- ▶ If the allegations in the Complaint are covered under federal laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC) or the U.S. Department of Housing and Urban Development (HUD), the HRCs will file the Complaint with the appropriate federal agency
- ▶ Or, if an individual initiates a Complaint with the EEOC or HUD, the federal agency may defer investigation and adjudication to the HRCs
- ▶ **Tip:** Familiarize yourself with your jurisdiction's rules regarding federal docket numbers

# When Do Presiding Officers Become Involved in Cases?

In **PA**, there are three situations when Hearing Examiners become involved in cases:

- ▶ When our office receives a request for a rule to show cause alleging that a respondent has failed to answer a Complaint
- ▶ When petitioned for issuance of a subpoena
- ▶ After a case is placed on the public hearing docket

In **WV**, the Administrative Law Judge (ALJ) only gets involved after a finding of probable cause, at which time the Complaint is placed on the public hearing docket.

- ▶ If an Answer is not filed during the investigation, probable cause is found based on adverse inference

# Subpoenas in PA

- ▶ The Hearing Examiner is authorized to issue subpoenas at different stages of the proceeding, for documents or testimony pursuant to a request made by either party
- ▶ The Hearing Examiner reviews the application to ensure it is legally sufficient, i.e. the request is relevant, material, and specific
- ▶ If the application is sufficient, the Hearing Examiner will sign and issue the subpoena for service
- ▶ The Hearing Examiner also reviews and rules upon any objections made by the party being served with the subpoena

# Subpoenas in WV

- ▶ If a subpoena is needed during the investigation stage, the ALJ is not involved
- ▶ The ALJ issues subpoenas in the following instances after a case is placed on the public hearing docket:
  - ▶ To compel a witness/party to testify at a discovery deposition
  - ▶ To compel a witness/party to produce evidence during discovery
  - ▶ To compel a witness/party to testify at a public hearing
  - ▶ To compel a witness/party to produce evidence at a public hearing

# Tips When Drafting Applications for Subpoenas

- ▶ Familiarize yourself with local rules around subpoenas
- ▶ Ask yourself whether someone who knows nothing about the case will know why you are requesting the documents
- ▶ Make sure to include a time period in the request



# Placement on the Public Hearing Docket in PA

- ▶ After a Complaint is filed, it is investigated
- ▶ If based on the investigation the investigator thinks that the Respondent discriminated, the case will be sent to the Legal Division for review
- ▶ If the Legal Division agrees, the case will be given to staff to attempt conciliation. If conciliation fails, Legal will then decide on whether to request that the case be placed on the public hearing docket

# Placement on the Public Hearing Docket in WV

- ▶ After a Complaint is filed, it is investigated.
- ▶ If based on the investigation the investigator thinks that there is probable cause that Respondent discriminated and conciliation has failed, the case will be sent to General Counsel for review.
- ▶ If General Counsel and the Executive Director agree, a notice of probable cause will be issued in employment and public accommodation cases; a notice of charge will be issued in housing cases.

# Preparing for a Hearing in PA

- ▶ Once a case is placed on the public hearing docket it is assigned to a Hearing Examiner
- ▶ The Hearing Examiner meets with the parties and their attorneys to plan for the hearing
- ▶ Examples of the issues discussed include how long each side expects to take to present their case and whether the hearing will be virtual or in person
- ▶ This process typically takes 4-5 months

# Preparing for a Hearing in WV

- ▶ Once a probable cause determination is made, the Complaint is placed on the Office of Judges' public hearing docket
- ▶ The ALJ issues a Notice of Public Hearing and Scheduling Order
- ▶ Examples of the issues included in the Order:
  - ▶ Requirement to file verified answer for attorneys to file notice of appearance (even if one was filed during investigation)
  - ▶ Discovery schedule
  - ▶ Mediation Dates for public hearing (usually 3 consecutive days are reserved)

# Common Pre-Hearing Issues

- ▶ Non-dispositive motions
- ▶ Sanctions
- ▶ Timeline for accepting pre-hearing motions
- ▶ Motions for summary judgment
- ▶ Discovery timelines
  
- ▶ **Tip:** Require parties to complete and exchange a pre-hearing conference form prior to the first meeting with the adjudicator

# The Hearing

- ▶ Hearings are open to the public and the media
- ▶ Both sides are given the opportunity to present their case through witness testimony and documents
- ▶ Both sides are allowed to question the other side's witnesses during the hearing
- ▶ The presiding officer swears in witnesses and rules on objections
- ▶ The presiding officer is also permitted to question witnesses
- ▶ A court reporter is present and transcribes everything that is said at the hearing, creating a transcript of proceedings

# Role of the Hearing Examiner (PA)

- ▶ The Hearing Examiner serves as a neutral decision-maker and fact-finder
- ▶ The Hearing Examiner makes recommendations to the Commission about how it should decide a case based on the evidence presented
- ▶ The Commission can choose to adopt or reject the Hearing Examiner's recommendation

# Role of the Administrative Law Judge (WV)

- ▶ The ALJ serves as a neutral decision-maker and fact-finder. The Office of Judges is separate from both HRC's General Counsel and the WV AGO
- ▶ The ALJ issues a final decision at the conclusion of the public hearing
- ▶ The Commission can choose to adopt, reject, or modify the ALJ'S final decision and issues a final order
- ▶ Either party may appeal an adverse final decision to the Commission



# Post-Hearing Process in PA

- ▶ At the conclusion of the hearing, the Hearing Examiner establishes a post-hearing briefing schedule which begins when the Office receives the transcript and notifies the parties
- ▶ Parties file post-hearing briefs containing proposed Findings of Fact and Conclusions of Law, citing references to the record
- ▶ The Hearing Examiner then uses the information in the transcript and the parties' briefs to write a recommendation
- ▶ Hearing Examiners meet with Commissioners to discuss; then the Commissioners vote to adopt or reject each recommendation
- ▶ Final orders of the Commission may be appealed to the Commonwealth Court

# Post-Hearing Process in WV

- ▶ At the conclusion of the hearing, the ALJ establishes a post-hearing briefing schedule which is triggered by the parties' receipt of the transcript\*
- ▶ Parties file post-hearing briefs containing proposed Findings of Fact and Conclusions of Law, citing references to the record
- ▶ The ALJ uses the information in the transcript and the parties' briefs to write a final decision
- ▶ Decision may be appealed to the Commission within 30 days; Commission adopts, modifies, or reverses and remands it
- ▶ If no appeal, Commission shall uphold ALJ's decision
- ▶ Final Orders of the Commission may be appealed to the WV judicial branch

# Available Remedies

- ▶ Cease and Desist Order
- ▶ Damages vary by context (i.e. housing v. employment)
- ▶ Civil penalties can be awarded
- ▶ Attorney's fees and costs
- ▶ Emotional distress damages
- ▶ Training for Respondents

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Questions?

Thank you!