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WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1991

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ENROLLED

Com. Sub. for

HOUSE BILL No. *2582*

(By ~~Mr.~~ *Deb P. White and S. Cook*)

— ● —

Passed *March 9,* 1991

In Effect *90 days from* Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 2582
(By DELEGATES P. WHITE AND S. COOK)

[Passed March 9, 1991; in effect ninety days from passage.]

AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-k, relating to creating a state long-term care ombudsman program within the commission on aging; short title; legislative purpose; definitions; employment of a state long-term care ombudsman, qualifications and duties; creation of regional long-term care ombudsman programs; employment of regional long-term care ombudsmen, qualifications and duties; creation of long-term care ombudsman volunteer programs; qualifications of ombudsman volunteers; duties; training and certification of long-term care ombudsman volunteers; investigation of complaints, including administrative and legal actions; access to long-term care facilities; access to records; subpoena powers; cooperation among government departments or agencies; confidentiality of investigations; limitations on liability for good faith actions of ombudsmen and persons assisting ombudsmen and for long-term care facilities for the actions of ombudsman and good faith actions of employees assisting ombudsmen; availability of legal counsel; penalties for willful interference, retaliatory actions; facility posting of long-term care ombudsman program infor-

mation; funding; promulgation of rules; and severability.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-k, to read as follows:

ARTICLE 5K. LONG-TERM CARE OMBUDSMAN PROGRAM.

§16-5K-1. Short title.

1 This article may be known and cited as the "West
2 Virginia Long-Term Care Ombudsman Program Act."

§16-5K-2. Legislative purpose.

1 The Legislature recognizes that the state commission
2 on aging, as set forth in article fourteen, chapter twenty-
3 nine of this code, pursuant to a grant from the federal
4 government, has established a West Virginia long-term
5 care ombudsman program. The Legislature declares
6 that it is the public policy of this state to encourage
7 community contact and involvement with residents of
8 long-term care facilities. The Legislature finds that in
9 order to comply with the federal Older Americans Act
10 of 1965, as amended, and to effectively assist residents
11 of long-term care facilities in the assertion of their civil
12 and human rights, the structure, powers and duties of
13 the West Virginia long-term care ombudsman program
14 shall be herein defined under this article.

§16-5K-3. Definitions.

1 As used in this article, unless a different meaning
2 appears from the context:

3 (a) "Government agency" means any department,
4 division, office, bureau, board, commission, council,
5 authority, or any other agency or instrumentality
6 created by the state or political subdivision thereof or
7 to which the state is a party or by any county or
8 municipality which is responsible for the regulation,
9 visitation, inspection, or supervision of long-term care
10 facilities or which provides services to residents or long-

11 term care facilities;

12 (b) "Long-term care facility" means any nursing
 13 home, personal care home, or residential board and care
 14 home as defined in section two, article five-c of this
 15 chapter; nursing homes operated by the federal govern-
 16 ment or the state government; extended care facilities
 17 operated in connection with hospitals; and any similar
 18 institution, residence or place, or any part or unit
 19 thereof, however named, in this state which is adver-
 20 tised, offered, maintained or operated by the ownership
 21 or management for consideration, for the express and
 22 implied purpose of providing accommodations and care
 23 or personal assistance to one or more persons who are
 24 ill or otherwise incapacitated or are dependent upon the
 25 services of others by reasons of physical or mental
 26 impairment and who are not related within the degree
 27 of consanguinity of second cousin to the owner or
 28 manager of the institution, residence or place.

29 (c) "Long-term care ombudsman volunteer" or "om-
 30 budsman volunteer" means any uncompensated individ-
 31 ual who performs the duties enumerated under section
 32 eight of this article: *Provided*, That the individual has
 33 received appropriate certification as set forth in section
 34 nine of this article.

35 (d) "Personal assistance" means personal services,
 36 including, but not limited to, the following: Help in
 37 walking, bathing, dressing, feeding or getting in or out
 38 of bed, or supervision required because of the age or
 39 mental impairment of the resident.

40 (e) "Regional long-term care ombudsman" means any
 41 paid staff of a designated regional long-term care
 42 ombudsman program who has obtained appropriate
 43 certification from the state commission on aging and
 44 meets the qualifications set forth in section seven of this
 45 article.

46 (f) "Resident" means an individual living in a nursing
 47 home, personal care home, a residential board and care
 48 home, or any long-term care facility as defined in
 49 subsection (b) of this section, or who has lived in such
 50 a setting, or who has made application to live in such

51 a setting: *Provided*, That nothing in this article shall be
52 construed to give a long-term care ombudsman the right
53 to obtain the waiting list of a long-term care facility.

54 (g) "State long-term care ombudsman" means an
55 individual who meets the qualifications of section five
56 of this article and who is employed by the state
57 commission on aging to implement the state long-term
58 care ombudsman program as set forth in this article.

59 (h) "Guardian" means a person lawfully invested with
60 the power and charged with the duty of taking care of
61 another person and managing the property and rights
62 of another person who for some peculiarity of status or
63 defect of age, understanding or self control is considered
64 incapable of administering his or her own affairs, to
65 include committees or other references under the code.

§16-5K-4. Creation of the state long-term care ombudsman program.

1 There is hereby created within the state commission
2 on aging, as set forth in article fourteen, chapter twenty-
3 nine of this code, the West Virginia long-term care
4 ombudsman program, pursuant to the Older Americans
5 Act of 1965, as amended.

§16-5K-5. State long-term care ombudsman; qualifications; duties.

1 (a) The state commission on aging shall employ a state
2 long-term care ombudsman to effect the purposes of this
3 article. The state long-term care ombudsman shall have
4 at least a master's degree in gerontology, social work,
5 health or a related field and shall have demonstrated
6 experience in one of the following areas: (1) The field
7 of aging; (2) health care; (3) community programs; (4)
8 long-term care issues; (5) working with health care
9 providers; (6) working with an involvement in volunteer
10 programs; and (7) administrative and managerial
11 experience. In lieu of the above educational and
12 experience qualifications, the state long-term care
13 ombudsman shall have a four-year degree in gerontol-
14 ogy, social work, health or a related field, plus five years
15 of full-time equivalent experience in gerontology, social

16 work, health or a related field. The state long-term care
 17 ombudsman shall participate in ongoing training
 18 programs related to his or her duties or responsibilities.
 19 The state long-term care ombudsman shall not have
 20 been employed within the past two years prior to the
 21 date of his or her employment under this section by a
 22 long-term care facility, or by any association of long-
 23 term care facilities, or by any organization or corpora-
 24 tion that directly or indirectly regulates, owns, or
 25 operates a long-term care facility.

26 (b) Neither the state long-term care ombudsman nor
 27 any member of his or her immediate family shall have,
 28 or have had within the two years preceding his or her
 29 employment under this section, any pecuniary interest
 30 in the provision of long-term care. For the purposes of
 31 this section, the term "immediate family" shall mean the
 32 spouse, children, natural mother, natural father, natural
 33 brothers or natural sisters of the state long-term care
 34 ombudsman.

35 (c) The duties of the state long-term care ombudsman
 36 shall include, but are not limited to, the following:

37 (1) Establishing a mandatory statewide procedure to
 38 receive, investigate, and resolve complaints filed on
 39 behalf of a resident, or filed on the state or regional
 40 long-term care ombudsman's own initiative on behalf of
 41 residents, relating to action, inaction or decisions of
 42 providers of long-term care services, or the representa-
 43 tives of such providers, of public agencies, or of social
 44 service agencies, which may adversely affect the health,
 45 safety, welfare and rights of such residents;

46 (2) Monitoring the development and implementation
 47 of federal, state and local legislation, regulations and
 48 policies with respect to long-term care facilities;

49 (3) Advocating for the rights of residents in long-term
 50 care facilities;

51 (4) Establishing a mandatory statewide training
 52 program and certification procedures for regional long-
 53 term care ombudsmen, excluding clerical staff, which
 54 shall include training in the following areas: (i) The

55 review of medical records; (ii) regulatory requirements
56 for long-term care facilities; (iii) confidentiality of
57 records; (iv) techniques of complaint investigation; (v)
58 the effects of institutionalization; and (vi) the special
59 needs of the elderly;

60 (5) Establishing and maintaining a statewide uniform
61 reporting system to collect and analyze data relating to
62 complaints and conditions in long-term care facilities for
63 the purpose of identifying and resolving significant
64 problems faced by residents as a class. Such data shall
65 be submitted to the office of health facility licensure and
66 certification of the department of health and human
67 resources on a regular basis;

68 (6) Promulgating mandatory statewide rules, regula-
69 tions and training related to the use of long-term care
70 ombudsman volunteers in the program, including
71 procedures to assure that the responsibility and author-
72 ity of ombudsman volunteers shall be restricted to
73 activities which do not involve access to confidential
74 resident or facility records, which do not involve
75 complaint investigation other than information gather-
76 ing to ascertain the nature and facts of a complaint, and
77 which do not involve the initiation or pursuit of legal
78 proceedings, actions or remedies; and

79 (7) Other duties as mandated by the Older Americans
80 Act of 1965, as amended.

**§16-5K-6. Establishment of regional long-term care
ombudsman programs.**

1 (a) The state commission on aging shall designate and
2 maintain regional long-term care ombudsman programs
3 encompassing all planning and development areas of the
4 state under the direction of the state long-term care
5 ombudsman. Any regional long-term care ombudsman
6 program so designated and maintained shall be a
7 representative of the state long-term care ombudsman
8 program.

9 (b) In order to be so designated, a regional long-term
10 care ombudsman program shall meet the following
11 requirements: (1) It shall have no pecuniary, licensing,

12 or organizational interest with long-term care facilities
13 or an association thereof; and, (2) it shall (i) maintain
14 a private, nonprofit status as defined under the Internal
15 Revenue Code of 1986, or (ii) function as a local or
16 regional government agency.

§16-5K-7. Regional long-term care ombudsmen; qualifications; duties; training; certification.

1 (a) Each regional long-term care ombudsman pro-
2 gram shall employ one or more regional long-term care
3 ombudsmen to effect the purposes of this article. The
4 regional long-term care ombudsman shall have at least
5 a four-year degree in gerontology, social work, health,
6 or a related field and demonstrated experience in one
7 of the following areas: (1) The field of aging; (2) health
8 care or social service programs; (3) community pro-
9 grams; and (4) long-term care issues: *Provided*, That
10 persons employed in a designated regional long-term
11 care ombudsman program on the date of enactment of
12 this article may be given a waiver from these require-
13 ments provided that within one year from the date of
14 enactment of this article they enter into a program
15 leading to a degree in gerontology, social work, health
16 or a related field or complete fifty hours of continuing
17 education units in gerontology, social work, health or a
18 related field every two calendar year periods. The
19 regional long-term care ombudsman shall participate in
20 ongoing training programs related to his or her duties
21 or responsibilities. The regional long-term care ombuds-
22 man may not have been employed within the past two
23 years prior to the date of his or her employment under
24 this section by a long-term care facility, or by any
25 association of long-term care facilities, or by any
26 organization or corporation that directly or indirectly
27 regulates, owns, or operates a long-term care facility.

28 (b) Neither the regional long-term care ombudsman
29 nor any member of his or her immediate family may
30 have, or have had within the two years preceding his
31 or her employment under this section, any pecuniary
32 interest in the provision of long-term care. For the
33 purposes of this section, the term "immediate family"
34 shall mean the spouse, children, natural mother, natural

35 father, natural brothers or natural sisters of the regional
36 long-term care ombudsman.

37 (c) The duties of the regional long-term care ombuds-
38 man shall include, but are not limited to, the following:

39 (1) Regularly monitoring long-term care facilities and
40 investigating complaints filed on behalf of a resident, or
41 filed on the regional long-term care ombudsman's own
42 initiative, relating to the health, safety, welfare and
43 rights of such residents, in accordance with complaint
44 investigation procedures developed by the state long-
45 term ombudsman care program: *Provided*, That nothing
46 in this section shall be construed as to grant a regional
47 long-term care ombudsman the right of entry to a long-
48 term care facility's drug rooms or to treatment rooms
49 occupied by a resident unless prior consent has been
50 obtained from the resident;

51 (2) Monitoring the development and implementation
52 of federal, state and local laws, regulations and policies
53 with respect to long-term care facilities;

54 (3) Training certified volunteers in accordance with
55 the training and certification program developed by the
56 state long-term care ombudsman program;

57 (4) Encouraging, cooperating with, and assisting the
58 development and operation of referral services which
59 can provide current, valid and reliable information on
60 long-term care facilities and alternatives to institution-
61 alization to persons in need of these services and the
62 general public;

63 (5) Submitting reports as required by the state long-
64 term care ombudsman program; and

65 (6) Other duties as mandated by the Older Americans
66 Act of 1965, as amended.

67 (d) The state long-term care ombudsman shall de-
68 velop and implement procedures for training and
69 certification of regional long-term care ombudsmen.
70 Regional long-term care ombudsmen who satisfactorily
71 complete the training requirements shall be certified by
72 the state commission on aging and shall be given

73 identification cards which shall be presented to em-
74 ployees of a long-term care facility upon request. No
75 regional long-term care ombudsman may investigate
76 any complaint filed with the West Virginia long-term
77 care ombudsman program unless such person has been
78 certified by the state commission on aging. Consistent
79 with the provisions of this article and any rules and
80 regulations promulgated pursuant to section twenty-one,
81 certified regional long-term ombudsmen shall be
82 representatives of the state long-term care ombudsman
83 program.

**§16-5K-8. Long-term care ombudsman volunteers; qual-
ifications; duties.**

1 (a) The regional long-term care ombudsman pro-
2 grams shall each create and maintain a volunteer
3 program to effect the purposes of this article, pursuant
4 to rules promulgated by the state long-term care
5 ombudsman and the state commission on aging.

6 (b) A long-term care ombudsman volunteer shall have
7 demonstrated interest in the field of aging and long-
8 term care issues and be able to communicate effectively
9 orally and in writing.

10 (c) No long-term care ombudsman volunteer nor any
11 member of his or her immediate family shall have, or
12 have had within the two years preceding his or her
13 employment under this section, any pecuniary interest
14 in the provision of long-term care. Nor shall any long-
15 term care ombudsman volunteer perform his or her
16 duties in any specific facility in which an immediate
17 family member of the long-term care ombudsman
18 volunteer is or has been a resident or applicant of that
19 specific facility. For the purposes of this section, the
20 term "immediate family" shall mean the spouse,
21 children, natural mother, natural father, natural
22 brothers or natural sisters of the long-term care
23 ombudsman volunteer.

24 (d) The long-term care ombudsman volunteer shall
25 perform only those duties assigned by the regional long-
26 term care ombudsman, including, but not limited to, the
27 following:

28 (1) Regularly visiting and talking with residents of
29 long-term care facilities, and inspecting all public areas
30 of the facility;

31 (2) Interviewing residents, family members and
32 employees of long-term care facilities to ascertain the
33 nature and facts of a complaint;

34 (3) Preparing reports for the regional long-term care
35 ombudsman's review or approval relating to complaint
36 interviews and the health, safety, welfare and rights of
37 residents of long-term care facilities;

38 (4) Informing residents as to the availability of
39 ombudsman services;

40 (5) Establishing and maintaining a cooperative
41 working relationship with employees of long-term care
42 facilities;

43 (6) Working to establish and maintain resident and
44 family councils to encourage interaction among resi-
45 dents, their families and long-term care facility staff;
46 and

47 (7) Performing other duties as assigned by the
48 regional long-term care ombudsman which are not
49 contrary to this article, to any applicable federal law,
50 or to rules promulgated by the state long-term care
51 ombudsman and the state commission on aging.

52 (e) Notwithstanding the duties described above, no
53 ombudsman volunteer may undertake or be assigned
54 duties involving complaint investigation activities, as
55 defined in section ten of this article, except for informa-
56 tion gathering to ascertain the nature and facts of a
57 complaint for the ombudsman's review. No ombudsman
58 volunteer, during the course of his or her volunteer
59 service, may initiate or pursue legal proceedings, actions
60 or remedies on behalf of a resident or long-term care
61 ombudsman program relating to a long-term care
62 facility, its employees, or its residents.

**§16-5K-9. Long-term care ombudsman volunteer train-
ing and certification.**

1 (a) The state long-term care ombudsman shall develop
2 procedures for training and certification of long-term
3 care ombudsman volunteers. The regional long-term

4 care ombudsman shall implement certification training
5 for all ombudsman volunteers in accordance with the
6 procedures developed by the state long-term care
7 ombudsman. No ombudsman volunteer shall perform
8 any of the duties enumerated in section eight of this
9 article prior to the completion of the training program,
10 except as a supervised portion of that training program.

11 (b) Ombudsman volunteers who have satisfactorily
12 completed the training and certification requirements
13 shall be given identification cards valid for one year
14 which shall be presented to employees of a long-term
15 care facility upon request. Every year thereafter, the
16 long-term care ombudsman volunteer shall complete at
17 least seven hours of additional training before a new
18 identification card is issued. Consistent with the
19 provisions of this article and any rules and regulations
20 promulgated pursuant to section twenty-one, certified
21 long-term ombudsman volunteers shall be representa-
22 tives of the state long-term care ombudsman program.

§16-5K-10. Investigation of complaints.

1 (a) Upon receipt of a complaint filed on behalf of a
2 resident, or on his or her own initiative, a state or
3 regional long-term care ombudsman shall investigate
4 any act, practice, policy or procedure of any long-term
5 care facility or government agency which affects the
6 health, safety, welfare or rights of any resident.

7 (b) Investigative activities of the state or regional
8 long-term care ombudsman shall include, but shall not
9 be limited to: Information gathering, mediation, nego-
10 tiation, informing parties of the status of the investiga-
11 tion, notification to any aggrieved party of alternative
12 processes, reporting of suspected violations to a licensing
13 or certifying agency, and the reporting of suspected
14 criminal violations to the appropriate authorities.

15 (c) The state or regional long-term care ombudsman
16 need not investigate any complaint upon determining
17 that:

18 (1) The complaint is trivial, frivolous, vexatious or not
19 made in good faith;

20 (2) The complaint has been too long delayed to justify
21 present investigation;

22 (3) The resources available, considering the estab-
23 lished priorities, are insufficient for an adequate
24 investigation;

25 (4) The matter complained of is not within the
26 investigatory authority of the long-term care ombuds-
27 man program; or

28 (5) A real or apparent conflict or interest exists and
29 no other ombudsman is available to investigate the
30 complaint in an impartial manner. If a determination
31 is made by a regional long-term care ombudsman not
32 to investigate any complaint, then the complaint shall
33 be referred to the state long-term care ombudsman who
34 shall make a final decision as to whether the matter
35 warrants further investigation.

36 (d) State and regional long-term care ombudsmen
37 may institute actions on behalf of residents to obtain
38 injunctive and declaratory relief, but not damages. In
39 order to enable ombudsman to bring such actions, the
40 secretary of the department of health and human
41 resources shall either:

42 (1) Establish an administrative hearing process under
43 the procedures for contested cases defined at article five,
44 chapter twenty-nine-a of this code to be available to any
45 state or regional ombudsmen bringing an action on
46 behalf of a resident against a long-term care facility or
47 governmental agency; or,

48 (2) Ensure that state and regional ombudsmen have
49 sufficient access to legal counsel to bring actions on
50 behalf of residents in civil court: *Provided*, That nothing
51 in this subsection shall be construed to prevent a
52 resident of a long-term care facility from filing directly,
53 on his or her own behalf, a suit for relief of any sort
54 in any state or federal court.

55 (e) The state commission on aging and other appro-
56 priate state governmental agencies shall establish and
57 implement cooperative agreements for receiving,
58 processing, responding to and resolving complaints

59 involving state governmental agencies under the
60 provisions of this section.

§16-5K-11. Access to long-term care facilities.

1 (a) A state or regional long-term care ombudsman
2 shall, with proper identification, have access to any long-
3 term care facility for the purposes of investigations of
4 a complaint filed pursuant to section ten of this article.
5 The state or regional long-term care ombudsman may
6 enter a facility at a time appropriate to the complaint.
7 The visit may be announced in advance or be made
8 unannounced as appropriate to the complaint under
9 investigation. Upon entry of the facility, the state or
10 regional long-term care ombudsman shall promptly and
11 personally advise one of the following persons of his or
12 her presence: (1) The administrator or acting adminis-
13 trator; (2) the residence director; or (3) another available
14 supervisory agent of the facility. If entry is refused by
15 the person in charge of said facility, the long-term care
16 ombudsman may apply to the magistrate court of the
17 county in which the facility is located for a warrant
18 authorizing entry, and the court shall issue an appro-
19 priate warrant if it finds good cause therefor.

20 (b) For activities other than those specifically related
21 to the investigation of a complaint, a state or regional
22 long-term care ombudsman, upon proper identification,
23 shall have access to any long-term care facility between
24 the hours of 8:00 a.m. and 8:00 p.m. in order to:

25 (1) Visit, talk with, and make ombudsman and social
26 services available to all residents;

27 (2) Inform residents of their rights and entitlements,
28 and their corresponding obligations, under applicable
29 federal and state laws by means of distribution of
30 educational materials and discussion in groups and with
31 individual residents;

32 (3) Assist residents in asserting their legal rights
33 regarding claims for public assistance, medical assist-
34 ance, and other public entitlements; and

35 (4) Supervise, direct or assist a long-term care
36 ombudsman volunteer in the performance of his or her

37 assigned duties.

38 Access to long-term care facilities under this section
39 shall be deemed to include the right to private commun-
40 ication with residents.

41 (c) A state or regional long-term care ombudsman
42 who has access to a facility under this section shall not
43 enter the living area of a resident without identifying
44 himself or herself to the resident. After identifying
45 himself or herself, an ombudsman shall be permitted to
46 enter the living area of a resident unless that resident
47 communicates on that particular occasion the resident's
48 desire to prevent the ombudsman from entering. A
49 resident shall have the right to terminate, at any time,
50 any visit by a representative of the ombudsman pro-
51 gram who has access under this section or any other
52 applicable section of this article.

53 (d) Access to a facility pursuant to subsections (a) or
54 (b) of this section includes the right to tour the facility
55 unescorted: *Provided*, That individual residents may
56 terminate at any time any communication by an
57 ombudsman having access under this section and that
58 nothing in this section shall be construed as to grant a
59 long-term care volunteer ombudsman the right of entry
60 to the drug rooms and treatment rooms of a long-term
61 care facility.

§16-5K-12. Access to records.

1 (a) The long-term care ombudsman is allowed access
2 to any resident's records, including medical records,
3 reasonably necessary to any investigation carried out
4 pursuant to the provisions of section ten of this article,
5 under the following conditions:

6 (1) If the resident is competent and has the ability to
7 write, access may only be obtained by the written
8 consent of the resident;

9 (2) If the resident is competent but unable to write,
10 oral consent may be given in the presence of a third
11 party who shall witness the resident's consent in
12 writing;

13 (3) If the resident is under a guardianship committee
 14 as set forth in article eleven, chapter twenty-seven of
 15 this code or has granted a medical power of attorney
 16 which is in effect as set forth in article thirty-a, chapter
 17 sixteen of this code, or granted any other power of
 18 attorney which is in effect, access may only be obtained
 19 by the written consent of the guardian or attorney in
 20 fact, unless the existence of guardianship, medical
 21 power of attorney or attorney in fact is unknown to the
 22 long-term care ombudsman upon investigation and to
 23 the long-term care facility, or unless the guardian or
 24 attorney in fact cannot be reached through normal
 25 communications channels within five working days;

26 (4) If the resident is unable to express written or oral
 27 consent and there is no guardian or attorney in fact or
 28 the notification of the guardian or attorney in fact is not
 29 achieved for the reasons set forth in subsection (3) of this
 30 section, or if the resident is deceased, inspection of
 31 records may be made by the ombudsman.

32 (b) The state or regional long-term care ombudsman
 33 is allowed access to all records of any long-term care
 34 facility that are reasonably necessary for the investiga-
 35 tion of a complaint under section ten of this article,
 36 including, but not limited to, facility incident reports,
 37 dietary records, policies and procedures of the facility
 38 that the facility is required to maintain under federal
 39 or state law, admission agreements, staffing schedules,
 40 any document depicting the actual staffing pattern of
 41 the facility and resident council and grievance commit-
 42 tee minutes.

§16-5K-13. Subpoena powers.

1 (a) The state long-term care ombudsman, or the
 2 designee of the state long-term care ombudsman, may,
 3 in the course of any investigation carried out pursuant
 4 to section ten of this article:

5 (1) Apply to the circuit court of the appropriate
 6 county or the circuit court of the county of Kanawha for
 7 the issuance of a subpoena to compel at a specific time
 8 and place, by subpoena, the appearance, before a person
 9 authorized to administer oaths, the sworn testimony of

10 any person whom the state or regional long-term care
11 ombudsman reasonably believes may be able to give
12 information relating to a matter under investigation; or

13 (2) Apply to the circuit court of the appropriate
14 county or the circuit court of the county of Kanawha for
15 the issuance of a subpoena duces tecum to compel any
16 person to produce at a specific time and place, before
17 a person authorized to administer oaths, any documents,
18 books, records, papers, objects or other evidence which
19 the state or regional long-term care ombudsman
20 reasonably believes may relate to a matter under
21 investigation.

22 (b) No subpoena or subpoena duces tecum applied for
23 by the state ombudsman or designee pursuant to
24 subsection (a) of this section shall be issued until a
25 circuit court judge in term or vacation thereof has
26 personally reviewed the application and accompanying
27 affidavits and approved, by a signed order entered by
28 the judge, the issuance of the subpoena or subpoena
29 duces tecum. Subpoenas or subpoenas duces tecum
30 applied for pursuant to this section may be issued on an
31 ex parte basis following review and approval of the
32 application by the judge in term or vacation thereof.

33 (c) The attorney general shall, upon request, provide
34 legal counsel and services to the long-term care
35 ombudsman program in all administrative proceedings
36 and in all proceedings in any circuit court and the West
37 Virginia supreme court of appeals. The prosecuting
38 attorney of any county shall provide without compensa-
39 tion legal counsel and services in criminal actions to the
40 long-term care ombudsman program in circuit court
41 proceedings in that county.

**§16-5K-14. Cooperation among government departments
or agencies.**

1 (a) The state or regional long-term care ombudsman
2 shall have access to publicly disclosable records of any
3 state government department, agency, or office reason-
4 ably necessary to any investigation carried out pursuant
5 to section ten of this article. The regional long-term care
6 ombudsman shall be notified of and be allowed to

7 observe any survey conducted by a government agency
8 affecting the health, safety, welfare or rights of
9 residents of a long-term facility.

10 (b) The state long-term care ombudsman shall de-
11 velop referral procedures to refer any complaint to any
12 appropriate state government department, agency or
13 office. The department or agency shall acknowledge
14 receipt and disposition within thirty calendar days on
15 any complaint referred to it by a state or regional long-
16 term care ombudsman.

17 (c) When abuse, neglect or exploitation of a resident
18 of a long-term care facility is suspected, the state or
19 regional long-term care ombudsman shall make a
20 referral to the office of adult protective services of the
21 department of health and human resources and to the
22 office of health facility licensure and certification of the
23 department of health and human resources. The state or
24 regional long-term care ombudsman shall coordinate
25 with the office of adult protective services and the office
26 of health facility licensure and certification on any
27 investigation of suspected abuse, neglect or exploitation
28 undertaken by those offices under the provisions of this
29 subsection.

30 (d) Any state government department, agency, or
31 office which responds to a complaint referred to it by
32 a state or regional long-term care ombudsman shall
33 forward to the long-term care ombudsman copies of
34 publicly disclosable inspection reports and plans of
35 correction, and notices of any citations and sanctions
36 levied against the long-term care facility identified in
37 the complaint.

38 (e) The state or regional long-term care ombudsman
39 shall seek to establish coordination with programs
40 which provide legal services for the elderly, including,
41 but not limited to, programs funded by the federal legal
42 services corporation or under the Older Americans Act
43 of 1965, as amended.

§16-5K-15. Confidentiality of investigations.

1 (a) Information relating to any investigation of a
2 complaint pursuant to section ten of this article that

3 contains the identity of the complainant or resident shall
4 remain confidential except:

5 (1) Where disclosure is authorized in writing by the
6 complainant, or resident or the guardian, committee,
7 attorney in fact or representative of the resident;

8 (2) Where disclosure is necessary to the office of adult
9 protective services of the department of health and
10 human resources in order for such office to determine
11 the appropriateness of initiating an investigation
12 regarding potential abuse, neglect or emergency
13 circumstances as defined in article six, chapter nine of
14 this code;

15 (3) Where disclosure is necessary to the office of
16 health facility licensure and certification of the depart-
17 ment of health and human resources in order for such
18 office to determine the appropriateness of initiating an
19 investigation to determine facility compliance with
20 applicable rules of licensure and/or certification; or

21 (4) Upon order of any appropriate county circuit court
22 after the judge in term or vacation thereof has con-
23 ducted a hearing following adequate notice to all parties
24 and rendered a determination as the interests of justice
25 may require.

26 (b) Notwithstanding any other section within this
27 article, all information, records and reports received by
28 or developed by a state or regional long-term care
29 ombudsman which relate to a resident of a facility,
30 including written material identifying a resident, are
31 confidential and are not subject to the provisions of
32 chapter twenty-nine-b of this code, and shall not be
33 disclosed or released by the long-term care ombudsman,
34 except under the circumstances enumerated in this
35 section.

36 (c) Nothing in subsections (a) or (b) of this section
37 shall be construed to prohibit the preparation and
38 submission by any state or regional long-term ombuds-
39 man of statistical data and reports, as required to
40 implement the provisions of this article or any applica-
41 ble federal law, exclusive of any material that identifies
42 any resident or complainant.

43 (d) The executive director of the state commission on
 44 aging shall have access to the records and files of the
 45 long-term care ombudsman program to verify its
 46 effectiveness and quality where the identity of any
 47 complainant or resident is not disclosed.

§16-5K-16. Limitations on liability.

1 (a) An ombudsman participating in an investigation
 2 carried out pursuant to section ten of this article and
 3 long-term care ombudsman volunteers who are perform-
 4 ing their duties pursuant to section eight of this article
 5 shall be immune from any civil liability that otherwise
 6 might result by reason of his or her participation in the
 7 investigation as long as such participation is not
 8 violative of any applicable law, rule or regulation, done
 9 within the scope of their employment and done in good
 10 faith.

11 (b) If an act or omission by any long-term care
 12 ombudsman, or by any facility employee acting in good
 13 faith at the direction of a long-term care ombudsman
 14 pursuant to a specific resident complaint, causes a
 15 resident's rights to be violated, no long-term care
 16 facility, its owners, administrators, officers, director,
 17 agents, consultants, employees or any member of
 18 management shall be held civilly liable as a result of
 19 said act or omission.

§16-5K-17. Availability of legal counsel.

1 The state commission on aging shall establish and
 2 maintain procedures to ensure that:

3 (a) Adequate legal counsel is available to the long-
 4 term care ombudsman program for advice, consultation
 5 and representation as necessary for any state or regional
 6 long-term care ombudsman or ombudsman volunteer in
 7 connection with the performance of the ombudsman's or
 8 ombudsman volunteer's official duties; and

9 (b) The long-term care ombudsman program has the
 10 ability to pursue administrative, legal and other
 11 appropriate remedies on behalf of residents of long-term

12 care facilities.

§16-5K-18. Willful interference; retaliation; penalties.

1 (a) Any individual who willfully interferes with or
2 impedes a state or regional long-term care ombudsman
3 or ombudsman volunteer in the performance of his or
4 her official duties shall be guilty of a misdemeanor, and,
5 upon conviction thereof, shall be fined not more than one
6 hundred dollars, or imprisoned in the county jail for not
7 more than ninety days, or both fined and imprisoned.

8 (b) Any individual who institutes or commits a
9 discriminatory, disciplinary, retaliatory or reprisal
10 action against any officer or employee of a long-term
11 care facility or government department or agency,
12 against any resident of a long-term care facility or
13 against any guardian, attorney in fact or against any
14 family member of any resident of a long-term care
15 facility for having filed a complaint with or provided
16 information in good faith to a state or regional long-term
17 ombudsman or ombudsman volunteer to aid the long-
18 term care ombudsman or ombudsman volunteer in
19 carrying out the duties pursuant to this article is guilty
20 of a misdemeanor, and, upon conviction thereof, shall be
21 fined not more than one hundred dollars, or imprisoned
22 in the county jail for not more than ninety days, or both
23 fined and imprisoned.

24 (c) Any individual violating the provisions of subsec-
25 tion (a) or (b) of this section shall, for the second or any
26 subsequent offense under either of these subsections, be
27 guilty of a misdemeanor, and, upon conviction thereof,
28 shall be fined not more than two hundred fifty dollars,
29 or imprisoned in the county jail for not more than ninety
30 days, or both fined and imprisoned. Each day of a
31 continuing violation after conviction shall be considered
32 a separate offense.

33 (d) There shall be a rebuttable presumption in any
34 civil action that any reprisal action, as defined below,
35 within ninety days of the incident, is discriminatory,
36 disciplinary or retaliatory in violation of the public
37 policy of this state. For the purpose of this section, the
38 term "reprisal action" refers to action taken by the

39 entity involved in a complaint or report against the
 40 person making the complaint or report, or the person
 41 with respect to whom the complaint or report was made
 42 because of the complaint or report, and includes, but is
 43 not limited to, the following:

44 (1) Discharge of transfer from a long-term care
 45 facility;

46 (2) Termination of service;

47 (3) Restriction or prohibition of access to the long-
 48 term care facility or its residents;

49 (4) Discharge from or termination of employment;

50 (5) Demotion or reduction in remuneration for
 51 services;

52 (6) Any restriction of rights affecting the person's
 53 ability to perform his or her employment duties or
 54 responsibilities or affecting the person's health, safety or
 55 welfare; or

56 (7) Any restriction against a state or regional long-
 57 term care ombudsman or ombudsman volunteer which
 58 impedes the carrying out of duties pursuant to this
 59 article.

60 (e) Nothing in this section shall be construed as to
 61 infringe upon the rights of an employer to supervise,
 62 discipline or terminate an employee for other reasons.

**§16-5K-19. Facility posting of long-term care ombuds-
 man program information.**

1 Every long-term care facility in this state shall
 2 provide each resident with a copy and shall post in a
 3 conspicuous location in at least ten-point type a notice
 4 of information on the long-term care ombudsman
 5 program. Such notice shall include: (1) The name,
 6 address and telephone number of the designated long-
 7 term care ombudsman program serving the region in
 8 which the facility is located; (2) a brief description of
 9 the services provided by the long-term care ombudsman
 10 program; and (3) a statement as to the penalties for
 11 willful interference and retaliation as provided in

12 section eighteen of this article. The form and wording
13 of the notice shall be approved by the state long-term
14 care ombudsman program.

§16-5K-20. Funding for long-term care ombudsman programs.

1 The state long-term care ombudsman program shall
2 receive such funds as are appropriated pursuant to the
3 Older Americans Act of 1965, as amended, for the
4 operation of the state long-term care ombudsman
5 program, and shall receive such funds as are approp-
6 riated by the Legislature for the operation of the
7 program.

8 The regional long-term care ombudsman program
9 shall receive such funds as are appropriated by the area
10 agencies on aging pursuant to the Older Americans Act
11 of 1965, as amended.

12 Any long-term care ombudsman program may solicit
13 and receive funds, gifts and contributions to support the
14 operation of the program. No program shall solicit or
15 receive any funds, gifts or contributions where the
16 solicitation or receipt would jeopardize the independ-
17 ence and objectivity of the program.

§16-5K-21. Promulgation of rules.

1 Pursuant to chapter twenty-nine-a of this code, the
2 state long-term care ombudsman and the state commis-
3 sion on aging shall promulgate rules to effectuate the
4 purposes and provisions of this article.

§16-5K-22. Severability.

1 If any provision of this article, or the application
2 thereof to any provision or circumstance, shall be held
3 unconstitutional or otherwise invalid, such invalidity or
4 unconstitutionality shall not affect the provisions or
5 application of this article which can be given effect
6 without the unconstitutional or invalid provisions of
7 application, and to this end the provisions of this article
8 are declared to be severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Forner Luck
Chairman Senate Committee

Ernest C. Moore
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Harriet M. Jones
Clerk of the Senate

Donald L. Kopp
Clerk of the House of Delegates

Keith Burdette
President of the Senate

BTCLC
Speaker of the House of Delegates

The within *is approved* this the *28th*
day of *March*, 1991.

Robert L. Taylor
Governor

PRESENTED TO THE
GOVERNOR

Date 3/20/91

Time 4:40 PM