WEST VIRGINIA ADMINISTRATIVE REGULATIONS

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Chapter 5, Article 11, West Virginia Code

Series I

(1982)

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 7/21/82
Administrative Law Division

Effective through
May 25, 1991

SUBJECT: Interpretive Rules Governing Discrimination on the Handicapped

Formally passed and approved by the West Virgnia Human Rights Commission on July 1, 1982, following public hearing on such Rules and Regulations as set forth in Chapter 29A, West Virginia Code.

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FORM NO 201
R10-651

FISCAL NOTE WORKSHEET

(Submit 4 copies)

HD NO 3388 DRAFT NO _____ BILL NO _____ RESOLUTION NO _____

SUBJECT Relating to human rights-handicapped individuals FUND _____

SOURCE OF REVENUE: ☒ GENERAL FUND ☐ SPECIAL ☐ OTHER (SPECIFY) _____

COST ESTIMATE BASED ON: ☒ AN ORIGINAL ESTIMATE ☐ BUDGET BILL ☐ OTHER (SPECIFY) _____

INCOME ESTIMATE BASED ON: ☐ AN ORIGINAL ESTIMATE ☐ BUDGET BILL ☒ OTHER (SPECIFY) None

SHOW OVER-ALL EFFECT IN ITEMS 1 AND 2 AND IN ITEM 3 GIVE EXPLANATION OF BREAKDOWN BY FISCAL YEAR INCLUDING LONG-RANGE EFFECT

EFFECT OF PROPOSAL	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
1. ESTIMATED TOTAL COST	$184,094	$ –	$ –	$184,094	$280,145
PERSONAL SERVICES	$	$	$	$125,644	$217,245
CURRENT EXPENSES				47,900	54,900
REPAIRS AND ALTERATIONS					
EQUIPMENT				10,550	8,000
OTHER					
2 ESTIMATED TOTAL REVENUES	$	$	$	$184,094	$280,145

3 EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

Above estimates based on bill passage becoming effective Fiscal Year 81-82 with a continuing estimate for Fiscal Year 82-83.

Personal Services cost estimates reflect for FY 81-82 the employment of one attorney, 5 Intergroup Relations Specialists, 2 Community Relations Specialist, 1 Research Analyst, and 2 secretaries. FY 82-83 (thereafter) reflects the retaining of previous staff with 12% salary increments plus additional employment of two Intergroup Relations Specialists, and one additional Secretary.

Current Expenses estimates reflect the general costs of office operations to cover the additional staff for FY 81-82; FY 82-83 estimates reflect an approximate increase.

Equipment estimates reflect costs of necessary office equipment and legal reference books to provide for new staff for FY 81-82; FY 82-83 provides same for additional staff.

DATE 3/16/81 AGENCY WV HUMAN RIGHTS COMMISSION AUTHORIZED REPRESENTATIVE Theresa D Toomey

FORM NO 202
(1/66)

FISCAL NOTE

(Submit 4 copies)

HB NO. 3888 DRAFT NO

EXPLAIN IN A CLEAR, CONCISE MANNER WHAT EFFECT THIS MEASURE WILL HAVE ON THE COSTS AND REVENUES OF STATE GOVERNMENT.

FISCAL NOTE TO Amend WV Human Rights Act to include handicapped individuals

(GIVE BILL OR RESOLUTION NUMBER WHEN AVAILABLE, OTHERWISE IDENTIFY BY SUBJECT, CODE REFERENCE, ETC.)

This proposal would amend Chapter 5, Article 11 of the Code to extend coverage of the WV Human Rights Act to handicapped individuals. Passage of this proposal would decrease the State revenue for FY 81-82 by $184,094. Thereafter (FY 82-83), this proposal would decrease State Revenue by $280,145. These figures represent the cost of employing additional staff needed to manage the higher volume of administrative complaints as a result of expanded coverage of the Act. The cost of necessary additional equipment is also included in these figures.

DATE 3/16/81 AGENCY WV HUMAN RIGHTS COMMISSION AUTHORIZED REPRESENTATIVE /s/ Lawrence D. Tawney

Section 1. GENERAL

1.01 Scope - The following interpretative regulations of the WV Human Rights Act set forth rules for complying with the handicap provisions of the WV Human Rights Act, WV Code §5-11, and are intended to interpret and implement the provisions of the WV Human Rights Act, particularly the 1980 amendments relating to handicap discrimination, and to assist all persons in understanding their rights, obligations and duties under the law. 1/

1.02 Authority - These regulations are issued under authority of West Virginia Code, Chapter 29A, Article 2, Section 1.

1.03 Filing Date - These regulations are promulgated on the _____ day of _____, 1982, and filed on _____day of _____, 1982, in the Secretary of State's Office.

1.04 Effective Date - These regulations become effective on the 1st day of August, 1982.

Section 2. DEFINITIONS

2.01 Handicap - Means any physical or mental impairment which substantially limits one or more of a person's major life activities. 2/

2.02 Physical Impairment - Means any physiological disorder or condition or cosmetic disfigurement or anatomical loss or abnormality affecting one or more of the following body sytems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic, and lymphatic. 3/

2.03 Mental Impairment - Includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and learning disabilities. 4/

2.04 Physical or Mental Impairment includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, autism, multiple sclerosis, cancer, diabetes, heart disease, obesity, drug addiction, tobacco addiction, and alcoholism. However, use or abuse of alcohol, tobacco or drugs in the absence of medically verifiable addiction does not constitute a "physical or mental impairment." 5/

2.05 Major Life Activities - Includes communication, ambulation, self-care, socialization, learning, vocational training, employment, transportation, and adapting to housing. 6/

2.06 Substantially Limits - Means interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flu, or sprains or minor injuries. 7/

2.07 Handicapped Person - Is one who: (a) has a handicap as defined above; (b) has a record of such handicap; or (c) is regarded as having such a handicap. 8/

Section 3. VERIFICATION OF HANDICAP

3.01 Burden of Proof (Complainant) - If, at the time of public hearing, there is a question or dispute as to whether the complainant is a handicapped person, or as to the nature of the impairment, the burden shall be upon the complainant to present by reasonable medical opinions or records (a) the nature of the handicapping condition; (b) any limitations caused by said handicap; and (c) any restrictions upon the handicapped individual's work activity. 9/

If the complainant prevails, the costs of obtaining and presenting such medical may be assessed against the respondent, under the provisions of Section 9.02 (b)(1) of the Rules and Regulations pertaining to practice before the West Virginia Human Rights Commission, Series II (1975).

Section 4. EMPLOYMENT DISCRIMINATION PROHIBITED

4.01 Discrimination Prohibited - No employer shall, on the basis of handicap, subject any qualified handicapped person to discrimination in employment as it relates to:

(a) Recruitment, advertising, and processing applications;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation or changes in compensation;

(d) Job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits, such as medical, hospital, accident, disability, life insurance, retirement benefits, unemployment benefits, and profit sharing and bonus plan, whether or not administered by the recipient, except as provided in paragraph 4.08;

(g) Selection and/or financial support for training, including apprenticeship, professional meetings, conferences, and other related activities and leaves of absence to pursue training;

(h) Employer-sponsored activities including social or recreational programs; and

(i) Any other terms, conditions, or privileges of employment. 10/

4.02 Qualified Handicapped Person Defined - As it relates to employment, a "qualified handicapped person" is one who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question. 11/

4.03 Reasonable Accommodation Defined -

(1) Reasonable accommodations are adjustments or modifications to the work assignment or work environment to enable a handicapped person to fulfill employment responsibilities. They include, but are not limited to:

(a) Making the worksite accessible to and usable by handicapped persons;

(b) Modification of equipment or tools so they can be used by a handicapped person;

(c) Job restructuring and modified work schedules;

(d) Alteration of the amount or methods of training;

(e) Acquisition of adaptive aides or devices.

(f) Reasonable accommodation should include the preparation of fellow workers for the new employee, to obtain their understanding of the handicapping limitations and their cooperation in accepting other reasonable accommodations for the new employee.

(2) An employer shall make reasonable accommodation to the known physical and mental impairments of qualified handicapped applicants or employees where necessary to enable a qualified handicapped person to perform the essential functions of the job. An employer shall not be

required to make such accommodation if s/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his or her business.

(3) In determining whether or not an accommodation would constitute an unreasonable burden upon the employer, the Commission shall consider:

(a) The overall size and profitability of the employer's operation; and/or

(b) The nature of the employer's operation including composition and structure of the employer's workforce; and/or

(c) The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as the Division of Vocational Rehabilitation);

(d) The possibility that the same accommodations may be able to be used by other prospective employees.

(e) The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, WV Code §18-10F-1 et seq. (Attached as Appendix A) Any changes or alterations required due to the failure of the employer (or his lessee or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable. 12/

4.04 Individual's Ability To Do The Job Safely - Each handicapped individual's ability to perform a particular job must be assessed on an individual basis. An employer may refuse to hire or may discharge a qualified handicapped person if, even after reasonable accommodation, the handicapped person is unable to perform the duties of the job without creating a substantial hazard to his/her health and safety or that of

others. However, any such decision shall be based upon the individual handicapped person's actual abilities, and not upon general assumptions or stereotypes about persons with particular mental or physical handicaps.

4.05 Handicaps Or Impairments Not Presently But Potentially Job Related -

(1) An employer shall not discriminate against an applicant or employee because of a handicap or impairment which is not presently job related but which may worsen and become job related in the future. Provided, that this section shall not be construed so as to impose an undue hardship on the employer.

(2) In determining whether the requirements of this section impose an undue hardship on the employer, the Commission shall consider:

(a) The length, cost, and nature of training required for the job;

(b) The length of time that is likely to elapse before the condition becomes job related;

(c) The normal turnover for the position;

(d) The factors listed in paragraph 4.03(3)(c).

4.06 Bona Fide Occupational Qualification

(1) WV Code §5-11-9 provides an exception to the prohibition of discrimination in employment when such discrimination is based on a bona fide occupational qualification (B.F.O.Q.). The Commission construes the B.F.O.Q. very narrowly and requires that, in order to establish a B.F.O.Q. which excludes all persons with a particular handicap, an employer must prove that all or virtually all persons with that particular handicap would be unable to perform the essential functions of the job involved.

(2) The following are examples of arguments which do not warrant application of the B.F.O.Q. exception and which constitute unlawful discrimination with respect to handicap:

(a) Refusal to select a handicapped individual because of the preferences (or assumptions about the preferences) of co-workers, customers, clients;

(b) Refusal to select a handicapped individual for a position because of uninsurability or increased cost of insurance (whether actual or anticipated).

(3) The following is an example of a B.F.O.Q. based upon handicap which may be permitted:

(a) Physical standards for employment which are directly related to safe performance of the job and are based upon complete factual information concerning working conditions and hazards, and essential physical requirements of each job. To establish a B.F.O.Q. based upon physical standards, the employer must demonstrate that the job cannot safely be performed by a person with particular handicaps even with reasonable accommodations.

4.07 Persons Whose Handicap Arises During Employment - When an individual becomes handicapped in the course of employment, the employer shall, if possible through reasonable accommodations, continue the individual in the same position or reassign the employee to a new position for which s/he is qualified or for which, with training, s/he may become qualified. The requirements of this paragraph shall be interpreted in such a way as to be consistent with WV Code §23-5A-1, which prohibits employers from discriminating against employees because they have applied for or received Workmen's Compensation benefits.

4.08 Insurance - An employer shall offer handicapped employees the same opportunity as nonhandicapped employees to obtain health and life insurance benefits, and no handicapped person shall, on the basis of handicap, be denied health and life insurance benefits provided in connection with employment. 13/

4.09 Burden Of Proof (Employer-B.F.O.Q.) - If an applicant is refused employment, or an employee is discriminated against in any term, condition, or privilege of employment, because of a handicap, the burden shall be upon the employer to establish that the refusal or discrimination was based upon a bona fide occupational qualification, (as defined in Paragraph 4.06) or that, even with reasonable accommodations, the employee would be unable safely and adequately to perform the essential functions of that job, or that employment of a handicapped individual would impose an undue hardship upon the employer under the circumstances described in Paragraph 4.05(2).

Section 5. PRE-EMPLOYMENT PRACTICES

5.01 Pre-employment Inquiries - An employer, labor organization, or employment agency shall not make pre-employment inquiry of an applicant as to whether the applicant has a physical or mental impairment or as to the nature or severity of such impairment, except that an employer, labor organization or employment agency may ask an applicant whether s/he has any physical or mental impairment that might interfere with his/her ability to perform the job applied for. 14/

5.02 Pre-employment Physicals - Pre-employment examinations relating to minimum physical standards for employment are lawful if:

(a) The minimum physical standards are necessary for performance of the job for which the person has applied;

(b) All applicants for the job are subjected to such an exam, regardless of whether they have been identified as handicapped. 15/

5.03 Pre-employment Tests And Other Selection Criteria -

(1) An employer shall not use any test or other selection criteria that discriminates against handicapped persons unless:

(a) The employer can demonstrate that the test or other criteria is job-related for the job in question; and

(b) The employer can demonstrate that there is not an alternate test or set of criteria that has less discriminatory impact.

(2) An employer shall select and administer tests concerning employment so as to best ensure that the test results accurately reflect the applicant's job skills, aptitude, or whatever factor the test purports to measure, rather than measuring the applicant's impaired sensory, manual or speech skills, unless those skills are the ones the test purports to measure. The employer shall make reasonable accommodations for handicapped applicants in testing, upon request, by providing such adaption equipment as may be necessary and modifying testing procedures as appropriate.

(3) Employer shall supply such adaptive equipment for taking the test as the applicant shall request. 16/

Section 6. HOUSING DISCRIMINATION PROHIBITED

6.01 Application - The following guidelines on discrimination in housing apply to owners, lessees, sublessees, assignees, or managing

agents of, or other persons having the right of ownership or possession of the right to sell, rent, lease, assign, or sublease any housing accommodations or real property or part or portion thereof, or any agents or employees of any of them, or any real estate brokers, real estate salespersons, or employees or agents thereof. 17/

6.02 Advertising, Solicitation, And Inquiries

(1) It is unlawful for any person to print, publish, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, listing publication, or sign with respect to the purchase, rental, lease, assignment or sublease of any housing accommodations or real property which expresses, directly or indirectly, any discrimination as to handicap or any intent to make any such discrimination. However, it is not unlawful for any person to print, publish, circulate, issue, display, post or mail any statement, advertisement, listing, publication, or sign which indicates that barrier free accommodations are available for sale, rent, lease, or occupancy.

(2) It is unlawful for any person to make any written or oral record or inquiry, or require the completion of any application which seeks information concerning the handicap of any prospective purchaser, tenant, or prospective occupant of any housing accommodations or real property unless such information is required by an agency of state or federal government and the person states clearly that the information requested is intended for use solely by the government agency.

(3) It is unlawful for any real estate broker, agent or salesperson to accept for listing any housing accommodation when the seller or lessor or his agent has expressed, directly or indirectly, an intention to discriminate against handicapped persons. 18/

6.03 Sale Or Rental -

(1) It is unlawful for any person to refuse to sell, rent, lease, assign or sublease or, to evict or otherwise to deny to or withhold from any person or group of persons any housing accommodations or real property, because of the handicap of such person or group of persons. For example, a representation to any person, because that person possesses a handicap, that real property is not available for inspection, sale or rental, when such real property is in fact so available, is a violation of the Act. Likewise, it is unlawful for any broker, agency or salesperson to misrepresent the price of real property listed for sale, rent or lease or to fail to communicate to the seller or lessor any offer made by a prospective buyer or lessor because the applicant or respective occupant possesses a handicap.

(2) It is unlawful for any person to fail or refuse to show, rent, or lease any housing accommodations or real property to a person with a disability who is required to be accompanied by (a) a guide animal, or (b) by an attendant; or to evict any person for this reason. Policies which restrict the availability of housing accommodations to persons without pets shall be void with respect to persons with a disability who require guide animals.

(3) It is unlawful to discriminate against any person or group of persons because of their handicap in the price, terms, conditions, or privileges of the sale, rental, or lease of any housing accommodations or real property, or in the furnishing of facilities or services in connection therewith. Handicapped persons shall not be required to pay extra compensation due to the fact that they need special aids, accessories or adaptive equipment. 19/

6.04 Accommodations And Adaptations - It shall be unlawful for any person to refuse to make reasonable accommodations necessary for making housing accommodations or real property accessible to and functional for handicapped persons who rent, lease, or sublease any such housing accommodations or real property. In determining whether an accommodation is reasonable, the Commission shall consider:

(1) The nature of the housing accommodation or real property and the number of living units, if any, which comprise it;

(2) The nature and cost of the accommodation needed (taking into account alternate sources of funding, such as the Division of Vocational Rehabilitation);

(3) Whether or not the housing accommodation or real property was purchased or improved with public funds; and

(4) The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, WV Code §18-10F-1 et seq. (Attached as Appendix A) Any changes or alterations required due to the failure of the owner, managing agent of the owner (or his lessee or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable. 20/

6.05 Financing - It is unlawful for any person or financial institution or lender to whom application is made for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodations or real property, or any agent or employee thereof to:

(1) Discriminate against any person or group of persons because of the handicap of such person or group of persons or of the prospective occupants or tenants of such housing accommodation or real property, in

the granting, withholding, extending, modifying, or renewing, or in the fixing of the rates, terms, conditions, or provisions of any such financial assistance or in the extension of services in connection therewith; or to

(2) Use any form of application for such financial assistance or to make any record of inquiry in connection with applications for such financial assistance which expresses, directly or indirectly, any discrimination as to handicap or any intent to make any such discrimination, unless such information is required by an agency of the state or federal government, and the person making the inquiry states clearly that the information requested is intended for use solely by the government agency. 21/

Section 7. PUBLIC ACCOMMODATIONS

7.01 Application - The following regulations apply to any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodations as defined by WV Code §5-11-3(j).

(1) It shall be unlawful to refuse, withhold from, or deny, either directly or indirectly, to any individual because of handicap, any of the accommodations, advantages, facilities, privileges, or services to qualified handicapped persons, the privileges of such place of public accommodation.

7.02 Advertising, Solicitation And Inquiries - It shall be unlawful to publish, circulate, issue, display, post, or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, privileges or services of any such place shall be refused, withheld from, or denied to any individual on account of handicap, or that the patronage or custom thereat of any handicapped individual is unwelcome, objectionable, not acceptable, undesired, or not solicited. However, any person may

advertise that a place of public accommodation is barrier free or otherwise accessible to handicapped persons.

7.03 Terms And Conditions - It is unlawful to discriminate against a handicapped person in the price, terms, or conditions upon which access to the accommodations, advantages, facilities, services, or privileges of any public accommodation may depend.

7.04 Guide Animals And Attendants -

(1) Handicapped persons have the right to be accompanied by a guide animal in any place of public accommodation.

(2) Handicapped persons have the right to be accompanied by an attendant in any place of public accommodation.

7.05 Accessibility And Reasonable Accommodations - It shall be unlawful to refuse to make reasonable accommodations necessary to make any public accommodation accessible to and functional for handicapped persons. In determining whether an accommodation is reasonable, the Commission shall consider

(a) The nature and size of the public accommodation;

(b) The nature and cost of the accommodation needed;

(c) Whether or not the public accommodation is owned, operated, funded, or used, by an agency of government; and

(d) The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, WV Code §18-10F-1 et seq. (Attached as Appendix A) Any changes or alterations required due to the failure of the owner, managing agent of the owner (or his lessee or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable. 22/

FOOTNOTES

1/ An effort has been hade to achieve consistency with other West Virginia statutes which address discrimination against handicapped persons.

WV Code §18-10F-1 et seq. (barring architectural bariers in public buildings and facilities);

WV Code §23-5A-1 (barring discrimination against persons who receive or apply for Workmen's Compensation);

WV Code §5-15-1 et seq. ("White Cane Law" barring discrimination against blind persons);

WV Code §27-5-9 (barring discrimination based on a person's receipt of services for mental illness, mental retardation, or addiction);

WV Code §17C-13-6 (reserved parking spaces for handicapped persons);

WV Code §18-20-1 et seq. (providing for education of exceptional children).

2/ This definition is derived directly from the language of WV Code §5-11-3(t) which in turn was based upon the definition in The Rehabilitation Act of 1973, as amended, 29 U.S.C. §706(7).

3/ Based on 45 C.F.R. §84.3(j)(2)(i) and adopted in numerous state laws and guidelines.

4/ Based on 45 C.F.R. §84.3(j)(2)(i)(B) and reflected in numerous state laws and regulations.

5/ This section specifically names certain conditions for the purpose of making it clear that they are included within the scope of these regulations.

Coverage of narcotics and alcohol addiction as handicapping conditions is a controversial and difficult area. A few states have elected to exclude these conditions from the definition of handicap (e.g., California, Georgia, and Louisiana). However, there is nothing in the statutory language or legislative history of the West Virginia statute to indicate an intention to except these conditions from the definition of handicap. Furthermore, addiction to alcohol and drugs is explicitly included in WV Code §27-5-9 which prohibits discrimination because of receipt of treatment for these conditions indicating explicit legislative concern to prevent discrimination in these areas.

As written, the regulation makes clear that alcohol, tobacco, and drug use or abuse are not handicaps. It is the medically verifiable condition of addiction which constitutes a handicap, and not the person's unwillingness to refrain from alcohol, tobacco, or drugs. Furthermore, a reading of the regulations as a whole makes it apparent that it is not the intention of the Commission to prohibit restrictions or discrimination against persons whose current use of drugs, alcohol, or tobacco constitutes a direct threat to the property or safety of others; or, in the case of employment, prevents the individual from performing the duties of the job.

6/ Based on federal regulations interpreting 29 U.S.C. §793, 41 C.F.R. Part 60-741, Appendix A.

7/ This exception was found in Missouri's Handicap Discrimination Regulations. It seems to be a useful exception making it clear that the legislature did not intend to change existing employment or educational rules with respect to temporary ailments.

8/ Like the definition of "handicap," this definition of "handicapped person" is based upon the definition of "handicapped person" in The Rehabilitation Act of 1973, 29 U.S.C. §706(7). Consistency between the state definition and the federal definition of "handicapped person" is desirable for the many state employers who are also subject to the requirements of 29 U.S.C. §793 or §794 as federal contractors or federal grantees. Numerous other states have adopted the federal definition of "handicapped person" (e.g., Vermont, Colorado, California, Iowa, Missouri, Oregon, and Pennsylvania.).

This regulation follows the federal definition and expands upon the statutory definition of "handicap" by including persons who are regarded as having a substantially limiting impairment and persons with a history of such impairment. This extension is necessary to make it clear that the law prohibits discrimination against persons who are incorrectly perceived as handicapped as well as persons who are correctly perceived as handicapped.

The phrase "person with a record of such impairment" refers to a person whose medical, educational, or employment record indicates (correctly or incorrectly) that the person had a handicapping condition in the past although the person may now be completely recovered. Examples are persons who have received psychiatric treatment in the past or persons who have had cancer or heart attacks in the past. Discrimination against persons who suffered handicapping conditions in the past but who have overcome their handicaps is a particularly invidious form of the discriminatory attitudes the Legislature intended to address in the 1981 amendments to the Human Rights Act. "Persons with a record of such impairment" also includes persons who have been erroneously classified, such as persons wrongly identified as mentally retarded or mentally ill.

Similarly, discrimination against persons who are regarded as being substantially impaired even though they are not actually impaired is discrimination rooted in prejudices or mistaken ideas about the capacities of persons who are not physically or mentally normal. For instance, a person may have epilepsy but have no resulting impairment if the condition is fully controlled with medication. Examples of discrimination against persons who are regarded as being substantially impaired include a refusal to hire a person who is obese on the mistaken assumption that he or she is not physically fit, or denial of employment to a person with a florid face on the mistaken assumption he or she has high blood pressure. Another example is the refusal to hire a person with X-ray evidence of congenital back anomaly even though the person has no impairment as a result of such anomaly.

9/ It is intended that medical evidence will be required only in cases where there is an actual dispute as to the nature or medical implications of the handicapping condition. (Based on Maryland Handicap Discrimination Guidelines, Section .04)

10/ This explication of the phrase "compensation, hire, tenure, terms, conditions, or privileges of employment" from WV Code §5-11-9(a) is adapted from the Section 504 regulations, 45 C.F.R. §84.11, and has been adopted by several other states (e.g., Ohio). To the extent that the Fair Labor Standards Act, 29 U.S.C. §214, exempts certain employers of handicapped workers from the requirement of paying the federal minimum wage, these regulations are deemed to be superceded by the federal statute.

11/ The West Virginia statute prohibits employment discrimination against an individual who is "able and competent to perform the services required." For brevity and to achieve consistency with the federal regulations, such a person is identified herein as a "qualified handicapped person." This definition makes it clear that ability to perform the job means ability to perform the "essential functions" of the job. This qualification is essential to prevent job discrimination against handicapped persons because job descriptions may often include requirements which would exclude a handicapped person but which are extraneous, or at least not essential to performance of the job. This definition may require a job description to be rewritten if it includes requirements that are not necessary to the essential functions of the job and which operate to exclude a handicapped person (e.g., the requirement that the applicant be able to climb stairs if the job could be done on the ground floor, or the ability to drive if the job is essentially an office job).

Closely connected to the requirement that the individual be able and competent to perform only the essential functions of the job, is the stipulation that employers must make reasonable accommodations to the employment restrictions and needs of handicapped persons. The West Virginia statute does not explicitly include a requirement of "reasonable accommodations" but such a requirement is strongly implied in the last sentence of WV Code §5-11-9, which states "it shall not be an unlawful discriminatory practice. . .to refuse to make any unreasonable capital expenditures to

accommodate the physical or mental impairment of any handicapped person" (emphasis added). The clear implication is that reasonable accommodations are permitted and, indeed, anticipated. Furthermore, upon examination of the federal employment guidelines and the laws of other states, the Commission observes that a "reasonable accommodation" requirement has been included in virtually all such laws; and, further, concludes that such a requirement is necessary to prevent evasion of the law's requirements and the perpetuation of past discriminaton in the guise of past practice.

12/ Based upon 45 C.F.R. §84 and the regulations of numerous states.

Worksites and work conditions designed for the physically and mentally normal discriminate inherently against handicapped persons. No catalogue of "reasonable accommodations" is attempted, for the key to reasonable accommodation is adaptation to the individual. Furthermore, the rapid advancement of technology in this field would render any attempted catalogue of adaptation immediately out of date. Examples of reasonable accommodations are:

- Waiving a no-pet rule to permit guide animals
- Provision of ramps, lifts, and elevators
- Provision of additional width to doorways
- Provision of bathroom stalls accessible to persons in wheelchairs
- Removing a minor function from a job description when the handicapped person can perform the major functions of the job.

13/ This regulation is not intended to inferfere with the Insurance Commissioner's statutory authority to regulate insurance companies.

14/ Based on 45 C.F.R. §84.11 and regulations of Missouri, Hawaii, and California.

15/ Based on 84 C.F.R. §84.11 and regulations of Missouri and New York.

16/ Examples of adjustments to testing situation to prevent discrimination against handicapped persons are (a) for blind individuals, translating written tests into braille or allowing the use of a reader; (b) for quadriplegic individuals, allowing someone to write for the applicant or allowing oral responses to written test questions.

17/ This list of persons covered is taken directly from WV Code §5-11-9(g).

18/ Paragraph 6.02 is based directly upon the language of WV Code §5-11-9(g)(3). Language is added to make it clear that advertising bar-

rier free accommodations is permitted, and that inquiries about handicap required for governmental purposes are permitted.

19/ Paragraph 6.03(3) states that handicapped persons may not be charged more for premises due to the fact that they use specialized equipment or have specialized needs.

20/ The language "accessible to and functional for" is from WV Code §18-10F-1 (West Virginia Law on Handicapped Persons and Public Buildings and Facilities). This regulation attempts to strike a balance between remedying the plight of handicapped persons who face a housing market poorly adapted to their needs while at the same time embodying the legislative intent that unreasonable capital expenditures should not be required. Case-by-case determinations will be required to determine whether or not accommodations are reasonable. Please note the consistency between this Section and Section 4.03(3), supra, including the applicability of the explanatory comment to that section.

21/ Based directly on the language of WV Code §5-11-9(h). Language is added making it clear that information about a person's handicap may be asked if such inquiry is required by a government law or regulation.

22/ Paragraphs 1.01 and 7.10(1) & (2) are based directly on the language of WV Code §5-11-9(f). Language is added to make it clear that advertising barrier free public accommodations is permitted. A great variety of facilities and services comprise public accommodations, and in time, with greater experience the Commission may develop specific standards for various types of public accommodations. At present, however, the Commission deems it best to issue general regulations, consistent with employment and housing regulations, which permit case-by-case determinations of whether an adaptation or accommodation is reasonable (cf. Paragraphs 4.03(3) and 6.04, supra.).

APPENDIX A

§ 18-10F-1 of the WEST VIRGINIA CODE

Article 10F

HANDICAPPED PERSONS AND PUBLIC BUILDINGS AND FACILITIES

18-10F-1. Purpose; definition of "public building or facility."
18-10F-2. Application of article.
18-10F-3. Rules and regulations.
18-10F-4. State board of public buildings created; membership; expenses.
18-10F-5. Enforcement of article.
18-10F-6. Severability.

§18-10F-1. Purpose; definition of "public building or facility."

It is hereby declared to be the public policy of this State that all public buildings, sidewalks, curbs and facilities covered by this article, as specified in section two [§ 18-10F-2] of this article, be accessible to and functional for the physically handicapped, without loss of function, space or facilities insofar as the general public is concerned.

As used in this article a public building or facility is one to which the public has a general right of access and includes the ways of travel to and from the same, but does not include:

1. Apartment houses with less than twenty units, row houses or rooming houses;
2. Convents or monasteries;
3. Jails or other places of detention;
4. Garages, hangars or boat houses;
5. Buildings classified as hazardous occupancies;
6. Warehouses;
7. Buildings specifically built for field service purposes such as, but not limited to, conservation fire towers, fish hatcheries, or tree nursery buildings; or
8. Residence halls at colleges or universities which have at least two other resident halls for men and two other resident halls for women so constructed as to allow physically handicapped persons reasonable means of access and use of such buildings. (1969, c. 109; 1974, c. 98.)

§ 18-10F-2. Application of article.

(a) The provisions of this article and the reasonable rules and regulations promulgated hereunder shall apply to all temporary, emergency or permanent buildings, sidewalks, curbs and facilities to be used by the public which are constructed after the effective date of this article [June 7, 1974].

(b) Notwithstanding the provisions of subsection (a) of this section, the provisions of this article and the reasonable rules and regula-

tions promulgated hereunder shall also be applicable to all buildings, sidewalks, curbs and facilities to be used by the public and which are under construction on the effective date of this article unless the director shall determine that the construction has reached a state where compliance is impractical. (1969, c. 109; 1974, c. 98)

§ 18-10F-3. Rules and regulations.

In order to implement the provisions of this article, the director of the division of vocational rehabilitation of the state board of education, with the approval of the state board of public buildings hereinafter created, shall promulgate reasonable rules and regulations. The director and the board, in promulgating and approving such reasonable rules and regulations, shall take into account the following:

(1) Use of buildings, sidewalks, curbs and facilities by persons confined to wheelchairs, persons using crutches or other walking aids, persons afflicted by sight or hearing loss, persons disabled by age and any other persons whose mobility is limited; and data shall be gathered to determine the needs of any such persons;

(2) Frequency of use by disabled persons as above enumerated; and

(3) Additional construction cost required to comply with the provisions of this article and such reasonable rules and regulations.

The director shall have the authority to except buildings, sidewalks, curbs and facilities from the provisions of this article and such reasonable rules and regulations, in whole or in part, if, in his opinion, compliance therewith would create a financial heardship, be impractical or serve no benefit.

All such reasonable rules and regulations shall be promulgated in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-A of this Code, and shall include, but not be limited to, provisions pertaining to the following:

(1) Reservation of parking spaces for the disabled where possible;
(2) Construction of exterior walkways, curbs and ramps;
(3) Design and construction of doorways;
(4) Design and construction of interior floors, steps, ramps and doorways;
(5) Design of and accessibility to elevators;
(6) Design and construction of toilet facilities for use by the disabled;
(7) Design and location of public telephones, water fountains and other conveniences to facilitate their use by the disabled; and
(8) Accessibility of at least one primary entrance to individuals in wheelchairs.

No rule or regulation promulgated hereunder shall require the construction of elevators in buildings or facilities not constructed in whole or in part by the use of state, county or municipal funds or the funds of any other political subdivision of this State when such buildings or facilities are less than three stories in height. (1969, c. 109; 1974, c. 98.)

§ 18-10F-4. State board of public buildings created; membership; expenses.

There is hereby created the state board of public buildings which shall consist of five members appointed by the governor, one member to be a representative of the state building commission, one member to be a representative of a municipality, one member to be an architect. Each member shall serve at the will and pleasure of the governor. The members of the board shall receive no compensation for their services on such board, but they shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of their duties as members of the board. (1969, c. 109; 1974, c. 98.)

§ 18-10F-5. Enforcement of article.

It shall be the duty of the director to enforce the provisions of this article and all reasonable rules and regulations promulgated hereunder, and it shall be the duty of the State, any county, municipality or other political subdivision thereof, or any department, agency, commission, board, bureau or individual responsible for the construction of any public building, sidewalk, curb or facility to comply with the provisions of this article and all such reasonable rules and regulations. Whenever the director ascertains that any such public building, sidewalk, curb or facility is about to be constructed or is under construction (which construction began after the effective date of this article [June 7, 1974] in violation of the provisions of this article or any such reasonable rules and regulations, he may petition the circuit court of the county wherein the construction is to be or is taking place for an order to compel compliance with the provisions of this article and such reasonable rules and regulations, and the court may compel compliance unless such court finds that compliance would create a financial hardship, be impractical or serve no benefit. (1969, c. 109; 1974, c. 98.)

§ 18-10F-6. Severability.

If any provision of this article or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or applications of the article, and to this end the provisions of this article are declared to be severable. (1969, c. 109.)