WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

CITE AUTHORITY W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Rules Regarding Discrimination Against Individuals With Disabilities

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Quewanncoii C. Stephens
Executive Director/Secretary
West Virginia Human Rights Commission

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STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

812 Quarrier Street
L&S Building, Sixth Floor
Charleston, West Virginia 25301
FAX (304) 558-0184

Antitrust & Consumer Protection Division
(304) 558-8986

Civil Rights Division
(304) 558-0546

Preneed Funeral Services
(304) 558-0303

Consumer Hotline
(800) 368-8808

August 17, 1993

HAND DELIVER

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

Marie Nickerson
Administrative Assistant
Legislative Rule Making Review Committee
Room M-152, State Capitol Complex
Charleston, West Virginia 25305

Re: West Virginia Human Rights Commission's Proposed Rules Regarding Discrimination Against the Handicapped (Title 77, Series 1)

Dear Ms. Nickerson:

In accordance with your instructions, enclosed please find a summary setting forth the proposed amendments to the Commission's handicap discrimination regulations. I appreciate your prompt attention in notifying me that this summary was not included in the packet of materials which we filed with your Committee and the Secretary of State's Office yesterday afternoon.

If you have any questions, or if we have failed to provide any necessary documents, please do not hesitate to contact me. Thank you for your cooperation and assistance in this matter.

Sincerely,

Mary Catherine Buchmelter

MARY CATHERINE BUCHMELTER
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MCB/jm
Enclosures
cc: Judy Cooper, Director
Administrative Law Division
Office of the Secretary of State

WEST VIRGINIA HUMAN RIGHTS COMMISSION
LEGISLATIVE RULES
TITLE 77, SERIES 1
RULES REGARDING DISCRIMINATION AGAINST THE HANDICAPPED

I. CIRCUMSTANCES NECESSITATING THE AMENDMENTS

The West Virginia Human Rights Commission's proposed Rules Regarding Discrimination Against the Handicapped amend the previous Commission rules which have been in effect since May 29, 1991. Since the original rules were promulgated, the federal Americans With Disabilities Act (ADA) has gone into effect.

The Human Rights Commission is already the substantially equivalent agency with the federal EEOC, and as such, can process claims of violations of the other federal laws (Title VII of the Civil Rights Act of 1964 [sex and race claims] and the Age Discrimination in Employment Act [age claims]). The EEOC pays the Commission to process these claims filed in West Virginia.

In order to contract with the EEOC to process claims that are violations of the ADA, the Commission must have an act that is equivalent to the federal act. (The state act can be broader, but it cannot be narrower.) Currently there are several aspects of the West Virginia Human Rights Act which are out of compliance. These amendments remedy that. If they are passed, the state Act is consistent with the federal act. A person with a disability will be able to file a complaint alleging a violation of the ADA with the Commission. The Commission will receive between $10,000 and $40,000 a year from the EEOC for processing ADA claims, and employers who are charged will have a local forum in which to defend these claims.

II. SUMMARY OF PROPOSED AMENDMENTS

1. They add language which clarifies the definition of handicap and excludes transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual disorders; compulsive gambling, kleptomania, or pyromania; and psychoactive substance use disorders resulting from current illegal use of drugs;

2. They add the federal language regarding pre-employment physicals. Employers may still perform pre-employment physicals, but they must be done after a job offer is made, not before; and

3. If an employee with a disability cannot perform the essential functions of a position for which he/she was hired, and there is another position available which that individual could do, the employer must consider that employee for the vacant position.

As stated above, all of these modifications are consistent with the federal law.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Discrimination Against Individuals With Disabilities

Type of Rule: X Legislative ____Interpretive ____Procedural

Agency West Virginia Human Rights Commission

Address 1321 Plaza East, Room 104/106, Charleston, WV 25301

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$ 0	$ 0	$ 0	$ 0	$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

These rules have no negative fiscal impact on the West Virginia Human Rights Commission. They are necessary for the Agency (WVHRC) to be awarded substantial equivalency with the Federal Equal Employment Opportunities Commission (EEOC) and would permit the State Agency to contract with the Federal Agency to process claims filed alleging violations of the Americans With Disabilities Act (ADA). Such a contractual relationship with the EEOC would result in an additional $10,000 to $50,000 per year for the State Agency.

3. Objectives of these rules:

These rules contain minor modifications to the current rules regarding non-discrimination against persons with disabilities, designed to make state requirements parallel to federal requirements.

Rule Title: Rules Regarding Discrimination Against Individuals With Disabilities

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

These rules will permit the WVHRC to receive "substantially equivalent agency" status. The WVHRC would then receive money from the EEOC for each case involving handicap discrimination that it would process. The WVHRC estimates that it would receive approximately $20,000 to $50,000 per year from EEOC.

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

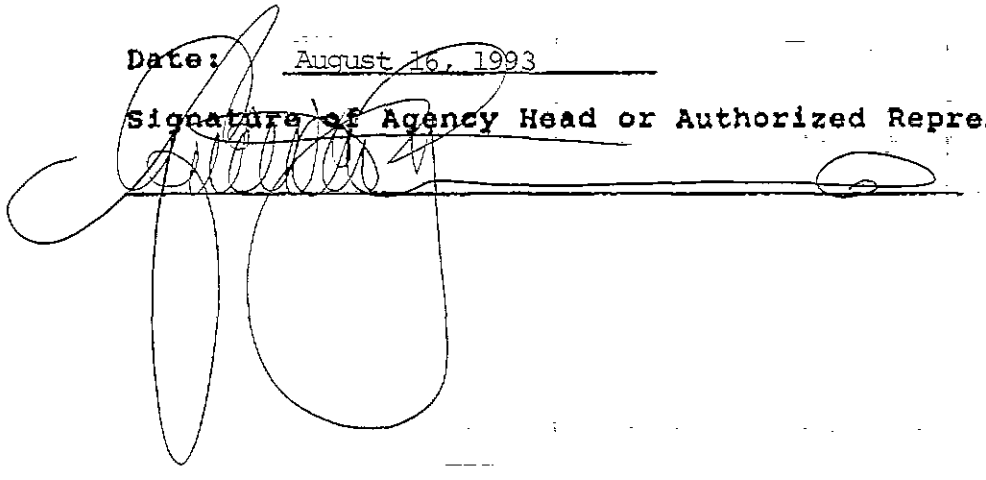
By helping to eliminate discrimination against the disabled in employment, the rules may have a favorable impact on that segment of the population. The requirements placed on employers is exactly the same as placed on them under federal law.

C. Economic Impact on Citizens/Public at Large.

None.

Date: August 16, 1993

Signature of Agency Head or Authorized Reprensentative



DATE: August 16, 1993

TO: **LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

FROM: West Virginia Human Rights Commission

LEGISLATIVE RULE TITLE: Rules Regarding Discrimination Against Individuals With Disabilities

1. **Authorizing statute(s) citation** W. Va. Code § 5-11-8(h) and §29A-3-1 et seq.

2. a. **Date filed in State Register with Notice of Hearing**

June 28, 1993

b. **What other notice, including advertising, did you give of the hearing?**

Sent notices to members of Employment Law Committee of the W. Va. State Bar, disabilities advocacy organizations, and prior commenters, soliciting comments on the proposed revisions

c. **Date of Hearing(s)** July 29, 1993

d. **Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.**

Attached X **No comments received** ____

e. **Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)**

August 16, 1993

f. **Name and phone number(s) of agency person(s) to contact for additional information:**

Mary Catherine Buchmelter,
Deputy Attorney General
Civil Rights Division
(304) 558-0546

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

   a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

      Not applicable.

   b. Date of hearing: Not applicable.

   c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

      Not applicable.

   d. Attach findings and determinations and reasons:

      Attached Not applicable.

FILED

Aug 16 4 19 PM '93

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 1

RULES REGARDING DISCRIMINATION
AGAINST ~~THE HANDICAPPED~~ INDIVIDUALS WITH DISABILITIES

§77-1-1. General.

1.1. Scope -- The following legislative regulations of the West Virginia Human Rights Act set forth rules for complying with the ~~handicap~~ disability provisions of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., and are intended to interpret and implement the provisions of the West Virginia Human Rights Act, particularly the 1989 amendments relating to ~~handicap~~ disability discrimination, and to assist all persons in understanding their rights, obligations, and duties under the law.

In these regulations, the word "handicap" and its derivations are replaced by the word "disability" and its derivations in order to conform with the Americans with Disabilities Act of 1990 §§101-108, 42 U.S.C. §§ 12111-12117 even though the provisions of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. uses the term "handicap."

1.2. Authority -- These regulations are issued under authority of W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq.

1.3. Filing Date -- These regulations are promulgated on the _____ day of _____, 1993, and filed on the _____ day of _____, 1993, in the Secretary of State's Office.

1.4. Effective Date -- These regulations become effective on the _____ day of _____, 1993.

~~1.5. Repeal of Former Rule -- This legislative rule repeals and replaces WV 77 CSR 1 "Rules Regarding Discrimination Against the Handicapped" filed 20 July 1982 and effective 1 August 1982.~~

§77-1-2. Definitions.

2.1. ~~"Handicapped Person"~~ "Disability" means, ~~a person who~~ with respect to an individual--:

2.1.1. ~~Has~~ a mental or physical impairment which substantially limits one or more of a person's major life activities; or

2.1.2. ~~Has~~ a record of such impairment; or

2.1.3. ~~Is~~ regarded as having such an impairment.

2.1.4. This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat (as defined in Rule 4.8) to property or the safety of others.

2.2. "Physical Impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.

2.3. "Mental Impairment" means any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "mental impairment" shall not include:

2.3.1. Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

2.3.2. Compulsive gambling, kleptomania, or pyromania;

2.3.3. Psychoactive substance use disorders resulting from current illegal use of drugs.

2.4. "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, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

2.5. "Substantially Limits" means: ~~interferes with or affects over a substantial period of time~~

2.5.1. Unable to perform a major life activity that the average person in the general population can perform;

2.5.2. Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major activity; but

2.5.3. 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 flue, or sprains or minor injuries.

2.6. "Major Life Activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, transportation, and adapting to housing.

2.7. "Has a Record of Such Impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

2.8. "Is Regarded as Having an Impairment" means any of the following:

2.8.1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by another as having such a limitation;

2.8.2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

2.8.3. Has none of the impairments defined above but is treated by another as having such an impairment.

§77-1-3. Verification of ~~Handicap~~ Disability.

3.1. If, at the time of public hearing, there is a question or dispute as to whether the complainant is an ~~handicapped person~~ individual with a disbility, or as to the nature of the impairment, the burden of proof shall be upon the complainant to present by reasonable medical opinions or records:

3.1.1. The nature of the ~~handicapping condition~~ disability;

3.1.2. Any limitations caused by said ~~handicap~~ disability; and

3.1.3. Any restrictions upon the ~~handicapped~~ individual's work activity. If the complainant prevails, the costs of obtaining and presenting such medical evidence may be assessed against the respondent.

3.2. 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~~ disability.

§77-1-4. Employment Discrimination Prohibited.

4.1. No employer shall, on the basis of ~~handicap~~ disability, subject any qualified ~~handicapped person~~ individual with a disability to discrimination in employment as it relates to:

4.1.1. Recruitment, advertising, and processing applications;

4.1.2. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

4.1.3. Rates of pay or any other form of compensation or changes in compensation;

4.1.4. Job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists;

4.1.5. Leaves of absence, sick leave, or any other leave;

4.1.6. 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;

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

4.1.8. Employer-sponsored activities, including social or recreational programs;

4.1.9. Any other terms, conditions, or privileges of employment.

4.2. "Qualified ~~Handicapped Person~~ Individual with a Disability" means an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job, ~~in question~~ and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description may be considered evidence of the essential functions of the job. A job function may be considered essential for several reasons, including but not limited to the following:

4.2.1. The function may be essential because the reason the employment position exists is to perform that function;

4.2.2. The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

4.2.3. The function may be essential because of the amount of time spent on the job performing the function.

4.3. "Able and Competent" means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a ~~serious~~ direct threat (as defined in Rule 4.8) of injury to the health and safety of either ~~the individual,~~ other employees, or the public.

4.4. "Reasonable Accommodation" means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an ~~handicapped~~ individual with a disability ~~employee~~ to be hired or to remain in the position for which he was hired. Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable a handicapped employee to remain in the position for which she/he was hired.

4.5. An employer shall make reasonable accommodation to the known physical or mental impairments of qualified ~~handicapped~~ individuals with disabilities ~~applicants or employees~~ where necessary to enable a qualified ~~handicapped person~~ individual with a disability to perform the essential functions of the job. Reasonable accommodations include, but are not limited to:

4.5.1. Making ~~facilities~~ facilities used by ~~handicapped employees~~ individuals with disabilities, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by ~~handicapped workers~~ individuals with disabilities;

4.5.2. Job restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent (as defined in Rule 4.3.) to perform, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions;

4.5.3. ~~Alteration of the amount or methods of training;~~ Appropriate adjustments or modifications of examinations, training materials or policies; and

4.5.4. The preparation of fellow workers for the ~~handicapped employee~~ individual with a disability, to obtain their understanding of the ~~handicapping~~ limitations of the disability and their cooperation in accepting other reasonable accommodations for the ~~handicapped employee~~ individual with a disability.

~~4.5.1.a. Reasonable accommodation does not require an employer to:~~

~~4.5.1.a.1. Eliminate the essential functions of a job;~~

~~4.5.1.a.2. Include assignment to a new or different job;~~

~~4.5.1.a.3. Reassign the employee to another position in order to provide her/him with work she/he can perform;~~

~~4.5.1.a.4. Assign an essential part of a job to another person.~~

4.6. An employer shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business. ~~In determining whether or not an accommodation would constitute an unreasonable burden upon the employer, the Commission shall consider:~~ The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in the following subparagraphs (4.6.1.-4.6.5.):

4.6.1. The overall financial resources of the employer; the overall size ~~and profitability~~ of the employer's operation with respect to the number of its employees; the number, type, and location of its facilities:; ~~and/or~~

4.6.2. The nature of the employer's operation, including the composition, ~~and~~ structure, and functions of the employer's workforce; the geographic separateness, administrative, or fiscal relationship of the employer's facility or facilities; ~~and/or~~

4.6.3. The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as Division of Vocational Rehabilitation); the effect on expenses and resources, or the impact otherwise of such accommodation upon the employer's operation;

4.6.4. The possibility that the same accommodations may be able to be used by other prospective employees;

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

4.7. 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~~ individual with a disability, even after reasonable accommodation, if the ~~handicapped person~~ individual is unable to perform the ~~duties~~ essential functions of the job without creating a substantial hazard to his/her health and safety or that of others. However, any such decision shall be used upon the individual ~~handicapped person~~'s actual abilities, and not upon general assumptions or stereotypes about persons with particular mental or physical ~~handicaps~~ disabilities.

4.8. In deciding whether an individual poses a ~~serious~~ direct threat ~~to his/her health and safety~~, the employer ~~must show~~ has the burden of demonstrating that a reasonable probability of a materially enhanced risk of substantial harm to the health or safety of others ~~the handicapped employee or handicapped applicant based on a consideration of the job requirements in light of that individual's handicap, and the work and medical history of the handicapped individual. The employer has the burden of demonstrating that his employment decision was based upon competent medical advice specific to the employment at issue~~ cannot be eliminated or reduced by reasonable accommodation. The employer's determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, factors to be considered include:

4.8.1. The duration of the risk;

4.8.2. The nature and severity of the potential harm;

4.8.3. The likelihood that the potential harm will occur; and

4.8.4. The imminence of the potential harm.

4.9. An employer shall not discriminate against an applicant or employee because of a ~~handicap~~ disability 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. In determining whether the requirements of this section impose an undue hardship on the employer, the Commission shall consider:

4.9.1. The length, cost, and nature of training required for the job;

4.9.2. The length of time that is likely to elapse before the condition becomes job related;

4.9.3. The normal turnover for the position;

4.9.4. The factors listed in Rule 4.6.

4.10. West Virginia 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~~ disability would be unable to perform the essential functions of the job involved.

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

4.11.1. Refusal to select an ~~handicapped~~ individual with a disability because of the preference (or assumptions about the preferences) of co-workers, customers, or clients;

4.11.2. Refusal to select an ~~handicapped~~ individual with a disability for a position because of uninsurability or increased cost of insurance (whether actual or anticipated).

4.12. The following is an example of a B.F.O.Q. based upon ~~handicap~~ disability which may be permitted:

4.12.1. 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.

4.13. When an individual ~~becomes handicapped~~ acquires a disbility in the course of employment, the employer shall, if possible through reasonable accommodation, continue the individual in the same position, or may reassign the employee to a new position for which she/he is qualified or for which, with training, she/he may become qualified. The requirements of this subsection shall be interpreted in such a way as to be consistent with W. Va. Code § 23-5A-1, which prohibits employers from discriminating against employees because they have applied for or received Worker's Compensation benefits.

4.14. An employer shall offer ~~handicapped~~ employees with disabilities employees the same opportunity as non~~handicapped~~ disabled employees to obtain health and life insurance benefits,

and no ~~handicapped person~~ individuals with disabilities shall, on the basis of ~~handicap~~ disability, be denied health and life insurance benefits provided in connection with employment, unless otherwise authorized by law.

4.15. If an applicant is refused employment, or an employee is discriminated against in any term, condition, or privilege of employment, because of a ~~handicap~~ disability, burden shall be upon the employer to establish that the refusal or discrimination was based upon a bona fide occupational qualification, (as defined in ~~subsection~~ Rule 4.10.) or that, even with reasonable accommodation, the employee would be unable safely and adequately to perform the essential functions of that job, or that employment of an ~~handicapped~~ individual with a disability would impose an undue hardship upon the employer under the circumstances described in ~~subsection~~ Rule 4.6.

§77-1-5. Pre-Employment And Employment Practices.

5.1. 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~~ make pre-employment inquiries into the ability of a job applicant to perform ~~the job applied for~~ job-related functions. ~~This section shall not apply to pre-employment physicals conducted by a licensed physician pursuant to Rule 5.2.~~

~~5.2 Pre-employment examinations relating to minimum physical standards for employment are lawful if:~~

~~5.2.1. The minimum physical standards are necessary for performance of the job for which the person has applied;~~

~~5.2.2. All applicants for the job are subjected to such an examination, regardless of whether they have been identified as handicapped.~~

5.2. An employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination if:

5.2.1. All entering employees are subjected to such an examination regardless of disability;

5.2.2. Information obtained regarding the medical condition or history of the applicant is collected and maintained

on separate forms and in separate medical files and is treated as a confidential medical record, except that--

5.2.2.A Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

5.2.2.B First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

5.2.2.C Government officials investigating compliance with this Act shall be provided relevant information on request; and

5.2.3. The results of such examination are used only in accordance with these regulations.

5.3. An employer shall not use any test or other selection criteria that discriminates against ~~handicapped persons~~ individuals with disabilities unless:

5.3.1. The employer can demonstrate that the test or other criteria is job related for the job in question; and

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

5.4. 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~~ individuals with disabilities in testing, upon request, by providing such adaptive equipment as may be necessary and modifying testing procedures as appropriate. The employer shall supply such necessary and reasonable equipment for taking the test as the applicant shall request.

5.5. After commencement of employee's employment duties, an employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee has a disability or as to the nature or severity of the disability, unless:

5.5.1. Such examination or inquiry is shown to be job-related and consistent with business necessity; or

5.5.2. Such examination is a voluntary medical examination, including voluntary medical histories, which are part of an employee health program available to employees at that work site; and

5.5.3. Information obtained under subparagraphs 5.5.1. and 5.5.2 regarding medical condition or history of any employee are subject to the requirements of subparagraphs 5.2.2. and 5.2.3. of Rule 5.2.

5.6. For purposes of this Act, a test to determine the illegal use of drugs shall not be considered a medical examination, and nothing in this Act shall be construed to encourage, prohibit, or authorize the conducting of testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

§77-1-6. Housing Discrimination Prohibited.

6.1. 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.

6.2. It is unlawful to print, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication, or sign, or to use any form or application for the purchase, rental, lease, assignment or sublease of any housing accommodations or real property or part or portion thereof, which expresses, directly or indirectly, any discrimination as to ~~handicap~~ disability or any intent to make any such discrimination and the production of any statement, advertisement, publicity, sign, form or application, record or inquiry purporting to be made by any such person shall be prima facie evidence in any action that the same was authorized by such person.

6.3. 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~~ disability 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.

6.4. 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~~ individuals with disabilities.

6.5. It is unlawful for any person to refuse to sell, rent, lease, assign or sublessee, 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~~ disability of such person or group of persons. For example, a representation to any person, because that person possesses a ~~handicap~~ disability, 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 prospective applicant possesses a handicap.

6.6. 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 guide animal or 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.

6.7. It is unlawful to discriminate against any person or group of persons because of their ~~handicap~~ disability 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 faculties or services in connection therewith. ~~Handicapped persons~~ individuals with disabilities shall not be required to pay extra compensation due to the fact that they need special aids, accessories, or adaptive equipment.

6.8. 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~~ individuals with disabilities who rent, lease, or sublease any such housing accommodations or real property. In determining whether an accommodation is reasonable, the Commission shall consider:

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

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

6.8.3. Whether or not the housing accommodation or real property was purchased or improved with public funds; and

6.8.4. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W. Va. Code § 18-10F-1 et seq. 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.

6.9. 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:

6.9.1. Discriminate against any person or group of persons because of the ~~handicap~~ disability 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

6.9.2. 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~~ disability 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.

§77-1-7. Public Accommodations.

7.1. These regulations apply to any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodations as defined by W. Va. Code § 5-11-2(j).

7.2. It shall be unlawful to refuse, withhold from, or deny, either directly or indirectly, to any individual because of ~~handicap~~ disability, any of the accommodations, advantages, facilities, privileges, or services to qualified ~~handicapped persons~~ individuals with disabilities, the privileges of such place of public accommodation.

7.3. 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~~ disability, or that the patronage or custom threat of any ~~handicapped~~ individual with a disability 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~~ individuals with disabilities.

7.4. It is unlawful to discriminate against a ~~handicapped person~~ individual with a disability in the price, terms, or conditions upon which access to the accommodations, advantages, facilities, services, or privileges of any public accommodation may depend.

7.5. ~~Handicapped persons~~ individuals with disabilities have the right to be accompanied by a guide animal in any place of public accommodation.

7.6. ~~Handicapped persons~~ individuals with disabilities have the right to be accompanied by an attendant in any place of public accommodation.

7.7. It shall be unlawful to refuse to make reasonable accommodations necessary to make any public accommodation accessible to and functional for ~~handicapped persons~~ individuals with disabilities. In determining whether an accommodation is reasonable, the Commission shall consider:

7.7.1. The nature and size of the public accommodation;

7.7.2. The nature and cost of the accommodation needed;

7.7.3. Whether or not the public accommodation is owned, operated, funded, or used, by an agency of government; and

7.7.4. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W. Va. Code § 18-10F-1 et seq. 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.

FILED

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

2d -

THE LIST OF PERSONS WHO APPEARED AT THE HEARING, COMMENTS RECEIVED, AMENDMENTS, AND REASONS FOR AMENDMENTS

1. The only person commenting at the public hearing was ALJ Richard Riffe, who noted that the language of § 4.5.4.a., regarding reasonable accommodation, seemed to be inconsistent with the comparable provisions of the federal Americans With Disability Act (ADA).

2. The written comments received are attached.

3. Below is a description of the substantive changes made to the regulations since the public hearing, and the reasons therefore. The only other changes corrected clerical errors.

a. § 1.5. -- This section was entirely deleted because in inaccurately suggested that these proposed rules are modifications of the 1982 version of the regulations. This was done in response to comments received from the West Virginia Advocates.

b. § 2.5. -- This section was amended to slightly modify the definition of the term "substantially limits," in order to track the language in the ADA. This was done in response to comments received from the West Virginia Advocates.

c. § 4.3. -- This was modified to remove language pertaining to the safety of the individual, in order to conform to the language of the ADA and to make these regulations internally consistent in this matter. This was done in response to comments received from the West Virginia Advocates.

d. § 4.5.4.a. -- This section was modified to delete the language regarding what does not constitute a "reasonable accommodation" in order to track the provisions of the ADA regarding job reassignment, and to be internally consistent with § 4.5.2 of these regulations. This modification was made in response to comments made at the public hearing by ALJ Richard Riffe.

e. § 5.1 -- This section was modified to clarify what type of employment inquiry an employer is permitted to make. This modification makes these regulations parallel the ADA regarding this matter. This modification was made in response to comments received from the West Virginia Advocates.

STEPTOE & JOHNSON

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WRITER'S DIRECT DIAL NUMBER

July 19, 1993

RECEIVED
JUL 20 1993
ATTORNEY GENERAL
CIVIL RIGHTS DIV.

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division
Office of the West Virginia
Attorney General
812 Quarrier Street
L & S Building, 6th Floor
Charleston, WV 25301

Dear Mary Kay:

I will be unable to attend the scheduled public hearing on the proposed new Human Rights Commission regulations due to previous commitments on that day. Nevertheless, please accept these written comments on the proposed new regulations.

First, the regulations seem to be, by and large, in line with the Americans with Disabilities Act and the EEOC's regulations. You have obviously done a very nice job of trying to bring our state law into compliance with the federal law on disability discrimination.

I have just two suggestions. First, I recommend that you add the following as Section 4.2.4: "A job function may be essential because, in order to satisfactorily perform the employment position, the job function in question must be accomplished." Perhaps that amplification of the definition of "job function" is self-evident, but it may be helpful to have that language, or similar language, in the regulations.

Second, I propose that Section 4.8 be re-written as follows: "In deciding whether an individual poses a direct threat, the employer has the burden of demonstrating that a reasonable probability of a materially enhanced risk of substantial harm to the health or safety of that individual or

of others . . . ." As you can see, the only language which I have suggested that you add is "of that individual." By not permitting employers to take into consideration whether the employee at issue poses a risk to his or her own safety, the Commission is putting the employer in a dilemma.

Specifically, if the employee cannot handle a job in such a fashion as not to harm himself or herself, the employer cannot protect itself against workers' compensation liability. Indeed, an argument can even be made that the employer cannot protect itself against Mandolidas liability. As you know, there is no "assumption of the risk" defense in the workers' compensation arena. As the proposed language currently reads, an employer faced with an employee who poses a direct threat to his or her own safety must either risk violating the Human Rights Act if the employer decides to transfer the employee to another position or risk potentially substantial workers' compensation and/or Mandolidas-type liability.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

C. David Morrison

CDM:clg

M E M O R A N D U M

TO: MIKE KELLY

FROM: SUSAN EDWARDS

DATE: JULY 14, 1993

RE: WEST VIRGINIA HUMAN RIGHTS COMMISSION PROPOSED RULES REGARDING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES

Just some quick thoughts on the proposed rules:

- In general, anyplace that says "individuals with a disabilities" should be changed to "individuals with disabilities" deleting the "a".

- Why does §77-1-1. 2.2., 2.3. and 2.4. break down the definition of physical and mental disabilities in this manor. The total definitions in these sections have all the elements of the ADA definition of "physical and mental disabilities". However, ADA defines "physical and mental disabilities" in one section instead of splitting it into "physical impairment", "mental impairment" and then "physical and mental impairment". This is confusing to me. Also why use impairment rather than disability?

- Definition in §77-1-1. 2.5. of "substantially limits" is unclear. Interferes or affects what? ADA definition of "unable to perform a major life activity that the average person in the general population can perform ..." is much clearer. They should follow the ADA definition closer.

- In §77-1-3. 3.1. after "individual with a disability", "person" should be deleted.

- Should add a §77-1-3. 4.2.4. definition of essential function to say "the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function" as contained in ADA.

- Under §77-1-3. 4.5 i. "facilities" should be changed to "facilities". Also in this section should individuals with disabilities be changed to "employees" with disabilities? This would be more in keeping

with what it used to say.

- Under §77-1-3. 4.7 second sentence "if" should be inserted after "individual with a disability" and before the coma. Also in this sentence "...the individual is unable to perform the duties of the job ...". "Duties" should be changed to "essential functions of the job".

- Under §77-1-3. 4.11.2. should "or a position" be "**for** a position"?

- Under §77-1-3. 4.14. "employees" should be deleted after "individuals with disabilities" and substituted for "individuals" so that it reads "An employer shall offer employees with disabilities ...".

- Concerning §77-1-5. 5.1. it was my understanding that under ADA you are never allowed to ask an applicant whether s/he has a disability. I thought you were only allowed to ask an applicant, after a job has been offered and accepted, whether they needed any accommodations to perform the job. (I could not find this specifically in ADA so it may be an interpretation.) I would suggest this section be changed to say "except that an employer, labor organization, or employment agency may ask an applicant whether s/he **needs an accommodation to perform the job after the job has been offered and accepted.**"

That is all I came up with. I really did not look at the housing or public accommodations sections too closely. Call me if you have any questions about any of this. Thanks.

cc: Alice Vande Linde

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Secretary of State

MARY P. RATLIFF
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Deputy Secretary of State

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(Plus all the volunteer help we can get)

FAX: (304) 558-0900

July 19, 1993

558-8986

Cre Johnson
The Civil Rights Division
Attorney General's Office
812 Quarrier Street
Charleston, WV 25301

Dear Cre:

You filed Series 1 of Title 77 on June 28, 1993. You need to change a couple of things when you file your rule as an Agency Approved Rule.

First on the sheet you use to do an Agency Approved Rule, the title of the rule being amended is not "Legislative Rules West Virginia Human Rights Commission." On that line you should put "Rules Regarding Discrimination Against Individuals with Disabilities."

Section 1.5 should be completely struck out. You do not need to put any new language in this Section. The changes of this rule are not so major that you need to repeal and replace.

Please let me know if you need any further help.

Sincerely,

Judy Cooper

Judy Cooper, Director
Administrative Law Division