WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #7

FILED

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

CITE AUTHORITY: W.Va. Code § 5-11-8(h) and 29A-3-15(g)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES___, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 77-1

TITLE OF RULE BEING FILED AS AN EMERGENCY: Rules Regarding Discrimination Against the Handicapped

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

1. The previous Rules Regarding Discrimination Against the Handicapped were declared invalid by the West Virginia Supreme Court of Appeals in Chico Dairy Co. v. Human Rights Commission, 382 S.E.2d 75 (1989).

2. The proposed rule faithfully reflects the intention of the legislature regarding handicapped persons, as expressed in the 1989 amendments to the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq.

3. The proposed rule is necessary to assist all persons in understanding their rights, obligations and duties under the Human Rights Act, as amended.

4. Unless filed as an emergency rule, persons (including handicapped individuals, employers, landlords and owners of public accommodations) will be making critical legal decisions, and facing potential legal liability, without benefit of the clear guidelines offered by the rules.

5. Failure to file the rule as an emergency rule would do substantial harm to the public interest in that persons may be held legally liable for acts of discrimination without full benefit of the guidelines and explanations of complex litigation offered by the rule.

Use Additional Sheets If Necessary.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Discrimination Against the Handicapped

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency: West Virginia Human Rights Commission

Address: 1321 Plaza East, Room 104/106, Charleston, WV 25301-1400

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ 0	$ 0	$ 0	$ 0	$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

The rule will have no fiscal impact on the West Virginia Human Rights Commission.

3. Objectives of these rules:

To provide legal guidelines to handicapped individuals, employers, landlords and owners of public accommodations regarding their rights and obligations concerning the protection of the handicapped under the West Virginia Human Rights Act.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The economic impact of the rule, while difficult to measure, will be minimal since employers, landlords and owners of public accommodations need only make such accommodations for the handicapped that are reasonable in the circumstances (including in the consideration the estimated cost) and can be done without undue hardship.

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

By helping to eliminate discrimination against them, the rule may have a favorable economic impact on handicapped citizens. For reasons set forth in 4A above, there should be little economic impact on employers, landlords and owners of public accommodations.

C. Economic Impact on Citizens/Public at Large.

None.

Date: February 15, 1990

Signature of Agency Head or Authorized Representative

SUMMARY OF PROPOSAL

The attached proposed rule concerns discrimination against the handicapped. It repeals and replaces the previous interpretive rule declared invalid by the West Virginia Supreme Court of Appeals in Chico Dairy Co. v. Human Rights Commission, 382 S.E.2d 75 (1989). It faithfully reflects the 1989 legislative amendments to the West Virginia Human Rights Act regarding protection of the handicapped.

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 1

RULES REGARDING DISCRIMINATION
AGAINST THE HANDICAPPED

§ 77-1-1 General.

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

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 _____, 1990, and filed on the _____ day of _____, 1990, in the Secretary of State's Office.

1.4. Effective Date. -- These regulations become effective on the _____ day of _____, 1990.

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.

§ 77-1-22 Definitions.

2.1. "Handicapped Person" means a person who:

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 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.

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. 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.

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

3.1. 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 of proof shall be upon the complainant to present by reasonable medical opinions or records:

3.1.1. The nature of the handicapping condition;

3.1.2. Any limitations caused by said handicap; 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.

§ 77-1-4 Employment Discrimination Prohibited.

4.1. No employer shall, on the basis of handicap, subject any qualified handicapped person 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; and

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

4.2. "Qualified Handicapped Person" means an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question.

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 threat 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 a handicapped employee to be hired or to remain in the position for which he was hired.

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

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

4.5.2. Job restructuring, part-time or modified work schedules, 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; and

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

4.6. 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. In determining whether or not an accommodation would constitute an unreasonable burden upon the employer, the Commission shall consider:

4.6.1. The overall size and profitability of the employer's operation; and/or

4.6.2. The nature of the employer's operation including composition and structure of the employer's workforce; 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);

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 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.

4.8. In deciding whether an individual poses a serious threat to his/her health and safety, the employee must show a reasonable probability of a materially enhanced risk of substantial harm to 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.

4.9. 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. 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. W.Va. 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 articular handicap 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 a handicapped individual because of the preferences (or assumptions about the preferences) of co-workers, customers or clients;

4.11.2. Refusal to select a handicapped individual 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 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 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 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 W. Va. Code § 23-5A-1, which prohibits employers from discriminating against employees because they have applied for or received Workmen's Compensation benefits.

4.14. 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, 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, 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 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 a handicapped individual would impose an undue hardship upon the employer under the circumstances described in Paragraph 4.6.).

§ 77-1-5 Pre-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 ability to perform the job applied for.

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 exam, regardless of whether they have been identified as handicapped.

5.3. An employer shall not use any test or other selection criteria that discriminates against handicapped persons 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 in testing, upon request, by providing such adaption equipment as may be necessary and modifying testing procedures as appropriate. The employer shall supply such adaptive equipment for taking the test as the applicant shall request.

§ 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 of application for the purchase, rental, lease, assignment or sublease of any housing accommodations or real property, or part or portion thereof, or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment or sublease of any housing accommodations on real property or part or portion thereof, which expresses, directly or indirectly, any discrimination as to handicap or any intent to make any such discrimination and the production of any statement, advertisement, publicity, sign, form of 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 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.

6.5 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.

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 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.

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 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 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 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, any of the accommodations, advantages, facilities, privileges, or services to qualified handicapped persons, 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, 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.

7.4 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.

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

7.6 Handicapped persons 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. 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.

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

February 27, 1990

Honorable Ken Hechler
Secretary of State
State Capitol Building 1
Suite 157K
Charleston, WV 25305

Dear Secretary Hechler:

The West Virginia Human Rights Commission recently forwarded proposed Regulations Relating to Handicap Discrimination to your office. These Rules and Regulations are intended to replace the Interpretive Handicap Guidelines which were ruled invalid by the WV Supreme Court of Appeals.

I have reviewed the proposed Handicap Regulations and have given my consent to the WV Human Rights Commission to initiate the actions necessary to effectuate said Rules.

If you have any questions on this matter, please feel free to contact me.

Sincerely,

Taunja Willis-Miller
Secretary
Health & Human Resources

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE