WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

FILED
1990 AUG 10 PM 2:58

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-3-15(g)

AMENDMENT TO AN EXISTING RULE: YES X NO ___

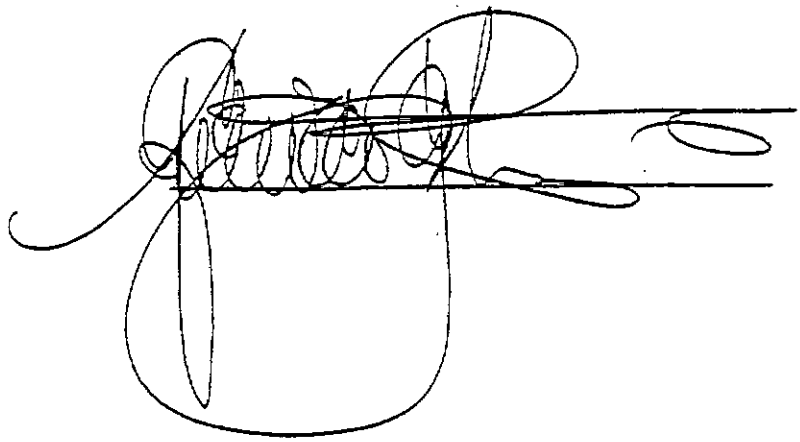
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 77-1

TITLE OF RULE BEING AMENDED: Rules Regarding Discrimination Against the Handicapped

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.



REPLY TO:
CIVIL RIGHTS DIVISION
812 QUARRIER STREET 6TH FLOOR
CHARLESTON, WV 25301

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

August 10, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol Complex
Suite 157-K
Charleston, West Virginia 25305

Re: Filing of agency approved proposed legislative rules pertaining to discrimination against the handicapped
Title 77, Series 1

Dear Mr. Hechler:

By this letter I am advising you that I have filed the above proposed legislative rules on behalf of the West Virginia Human Rights Commission with the Legislative Rule-Making Review Committee as agency approved rules.

Enclosed please find a copy of the agency approved rules and a copy of the notice of agency approval, along with a copy of the entire submission forwarded to the Legislative Rule-Making Review Committee. Relatively minor amendments have been made to the proposed legislative rules as originally filed with your office.

If you have any questions concerning this matter, please do not hesitate to contact me at 348-0246. Thank you for your attention to this matter.

Sincerely,

Mary Catherine Buchmelter

MARY CATHERINE BUCHMELTER
SENIOR ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MCB/jm
Enclosures

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE

The previous Rules Regarding Discriminataion 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).

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.

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

Unless adopted as a final 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.

Failure to adopt the 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 rules.

APPENDIX B

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

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 rules, 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 rules 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, or owners of public accommodations.

C. Economic Impact on Citizens/Public at Large.

None.

Date: August 10, 1990

Signature of Agency Head or Authorized Representative

DATE: AUGUST 10, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: QUEWANNCOII C. STEPHENS, Executive Director
West Virginia Human Rights Commission

LEGISLATIVE RULE TITLE:

1. Authorizing statute(s) citation W. Va. Code § 5-11-8(h) and § 29A-3-15(g)

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

February 26, 1990

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

Letters and notices of the public hearing were sent to advocacy organizations, employers, and members of the State Bar

c. Date of hearing (s): April 4, 1990

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 10, 1990

f. Name and phone number of agency person to contact for additional information:

Quewanncoii C. Stephens
Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104/106
Charleston, WV 25301 348-2616

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

SUMMARY OF CHANGES
Title 77, Series 1

As a result of review and comment by the Legislative Rule-Making Review Committee, the following changes to Legislative Rule Title 77, Series 1, have been made:

4.4. Add sentence to end: 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.

4.5.2. Change the word "~~restructuring~~" to "modification".

4.5.4. Add to section the following subsections:

4.5.4.A. Reasonable accommodation does not require an employer to:

4.5.4.A.1. Eliminate the essential functions of a job;

4.5.4.A.2. Include assignment to a new or different job;

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

4.5.4.A.4. Assign an essential part of a job to another person.

4.8. Change the word "~~employee~~" to "employer" must show a reasonable . . . .

4.15. Insert new language as follows: ". . .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~~ Rule 4.6."

5.1. Add the following sentence to the end of the section: This rule shall not apply to pre-employment physicals conducted by a licensed physician purusant to Rule 5.2.

SUMMARY OF CHANGES
Title 77, Series 1

5.4. Change the word "~~adaption~~" to "adaptive" equipment. Insert new language in last sentence: The employer shall supply such necessary and reasonable equipment for taking the test as the applicant shall request.

6.2. Change the word "~~of~~" to "or" application for the purchase . . .

Change the word "~~of~~" to "or" application, record or inquiry . . .

6.5. In the last sentence change the word "~~respective~~" to "prospective" and change the word "~~occupant~~" to "applicant" possesses a handicap.

6.8.2. Delete the "]" symbol.

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 West Virginia Human Rights Act set forth rules for complying with the handicap 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 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.

§77-1-2. 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 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.

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 individuals' 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;

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. 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 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 faculties 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~~ modification, 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.

4.5.4.A. Reasonable accommodation does not require an employer to:

4.5.4.A.1. Eliminate the essential functions of a job;

4.5.4.A.2. Include assignment to a new or different job;

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

4.5.4.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:

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 used 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~~ employer 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 particular 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 preference (or assumptions about the preferences) of co-workers, customers, or clients;

4.11.2. Refusal to select a handicapped individual or 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 she/he is qualified or for which, with training, she/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 Worker'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~~ Rule 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 she/he has any physical or mental impairment that might interfere with his/her ability to perform the job applied for. This rule 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.

5.3. 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~~ 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.

§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~~ 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 or any intent to make any such discrimination and the production of any statement, advertisement, publicity, sign, form ~~of~~ 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 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 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 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~~ prospective ~~occupant~~ 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 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 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.

BRIEF SUMMARY OF RULE

The attached rule concerns discrimination against the handicapped. It repeals and replaces the previous interpretative rule declared invalid by the West Virginia Supreme Court of Appeals in Chico Dairy Co. v. West Virginia Human Rights Commission, 382 S.E.2d 75 (1989). Emergency rules concerning discrimination against the handicapped were filed on February 26, 1990. Requests for comments were sent out to groups representing people with handicaps, members of the Bar, and employers. A public hearing was held on April 4, 1990. After a thorough review of all comments, revisions were made. The attached rule faithfully reflects the 1989 legislative amendments to the West Virginia Human Rights Act and case law regarding protection of the handicapped.

PROPOSED

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 1

FILED
1990 FEB 20 PM 2:58

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.

HEARING ON HANDICAPPED RULES
ATTENDANCE SHEET

	NAME	ADDRESS	PHONE	COMMENTS PROPOSED WRITTEN	ORAL
1.	Charli Fulton	West Virginia Advocates 1524 Kanawha Blvd. E. Charleston, WV 25311	346-0847		✓
2.	[illegible]	1524 Kanawha Blvd E. Charleston, WV 25311	346-0847		[illegible]
3.	Gail Bailey	* Jackson & Kelly PO Box 553 Charleston WV 25322	340-1120	✓	✓
4.	Roger Wolfe	* Jackson & Kelly PO Box 553 Charleston WV 25322	340-1105	✓	✓
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TO: Quewanncoii C. Stephens
Executive Director
West Virginia Human Rights Commission

FROM: West Virginia Coal Association

RE: Comments On Proposed Rules Regarding Discrimination Against the Handicapped

DATE: April 4, 1990

The West Virginia Coal Association, by counsel, respectfully submits the following comments to the West Virginia Human Rights Commission on the proposed Rules Regarding Discrimination Against the Handicapped.

REASONABLE ACCOMMODATION

RULE 4.5, et seq.

With respect to the reasonable accommodation standard set forth in Rule 4.5, et seq. the West Virginia Coal Association believes that further clarification is required to assist employers in understanding their obligations under this chapter. To that end, the Coal Association requests that the phrase "[j]ob restructuring" be deleted from Rule 4.5.2 and the following language be substituted: "Modifying nonessential aspects of the job." This proposed language more precisely defines employer obligations consistent with both judicial interpretation of analogous federal law and the West Virginia Supreme Court of Appeals decision in Coffman v. West Virginia Board of Regents, 386 S.E.2d 1 (W. Va. 1988). According to Coffman and numerous federal courts construing reasonable

accommodation under the Rehabilitation Act of 1973, employers are not required to implement major job restructuring, create new jobs or assign handicapped persons to part-time or light duty employment.

Moreover, the Coal Association proposes that the following sections be inserted after Rule 4.5.4 to further clarify employer obligations:

> 4.5A Reasonable accommodation does not require an employer to:
>
> > 4.5A.1 Eliminate the essential functions of a job or rewrite job descriptions,
> >
> > 4.5A.2 Create alternate or additional positions or reassign a handicapped employee to another position in order to provide the handicapped employee with work which s/he can perform where the handicapped employee can no longer perform the essential functions of a job position, or
> >
> > 4.5A.3 Assign an integral part of a job to another person.

This proposed language also reflects both federal court interpretation and our Supreme Court's holding in Coffman. Furthermore, this additional qualification of the reasonable accommodation standard eliminates the ambiguity created by the existing provision.

RULE 4.13

For several reasons, the West Virginia Coal Association strongly urges that Rule 4.13 be deleted in its entirety. First of all, this rule arguably constitutes a

guarantee of employment to any individual injured on the job. Moreover, this provision clearly exceeds the legitimate authority of the Commission under the West Virginia Human Rights Act. By promulgating such a rule, the Commission is attempting to regulate matters outside the ambit of the Act. Furthermore, by proposing such a sweeping mandate, the Commission is, in essence, invading the province of the West Virginia State Legislature, which has exclusive authority to alter our workers' compensation laws. Plainly, Rule 4.13 enlarges substantive rights created by the Act; and as such, the promulgation of this rule is an act ultra vires, and the regulation is void and of no affect. See Chico Dairy Company v. State Human Rights Commission, 382 S.E.2d 75 (W. Va. 1989); State ex rel. Callaghan v. W. Va. Civil Service Commission, 166 W. Va. 117, 273 S.E.2d 72 (1980).

It is further noted that Rule 4.13 is directly in conflict with the West Virginia Supreme Court's decision in Yoho v. Triangle, PWC, Inc., 336 S.E.2d 204 (W. Va. 1985). In Yoho, the Court held that an employer does not unlawfully discriminate against persons receiving workers' compensation benefits by terminating those persons under a neutral contract provision or company policy. This proposed rule, however, would effectively nullify the Supreme Court's holding in Yoho. Such a radical policy should not be effected by administrative rulemaking, but only through the legislative power to enact or amend West Virginia law.

PRE-EMPLOYMENT PRACTICES

RULE 5.1

The West Virginia Coal Association proposes that employers be allowed to have licensed physicians, during pre-employment physicals, make inquiries broader than those provided for in Rule 5.1. In this regard, the Coal Association suggests that the following sentence be added to Rule 5.1: "This rule shall not apply to pre-employment physicals conducted by a licensed physician pursuant to Rule 5.2." As presently worded, Rule 5.1 would appear to preclude an employer from inquiring about an applicant's medical history or his present medical condition, even in the context of a pre-employment physical examination. In promulgating Rule 5.1, the Commission is apparently concerned that employers will screen out applicants who identify physical impairments without making an individualized determination concerning the applicant's ability to perform the job. This concern is not present when a licensed physician, with knowledge of the job duties, is requesting this information in order to make an objective determination of the applicant's ability to perform the job.

In fact, a physician could not conduct an effective physical examination if the physician was limited to asking the applicant whether a physical or mental impairment has affected the applicant's ability to perform the job. Physicians must be permitted to inquire into the nature or severity of such

impairments. In many, if not most instances, applicants will not know whether a physical or mental impairment will affect their ability to perform the job. Only a physician with knowledge of the job requirements can determine whether an applicant can perform the job.

To the extent that Rule 5.1 prohibits inquiries concerning an applicant's physical condition in pre-employment physicals, this rule is also inconsistent with Rule 4.8 of the proposed Handicap Regulations. Rule 4.8 provides that an applicant can be rejected on the basis of a medical condition which constitutes a handicap only after individual consideration of the job requirements in light of that individual's handicap, and the work and medical history of the handicapped individual. If Rule 5.1 is literally applied, a physician could not take an applicant's medical history and, therefore, could not make the analysis required in Rule 4.8.

RULE 5.3

The West Virginia Coal Association recommends that Rule 5.3 be deleted. The Commission is apparently attempting to apply "disparate impact" standards to tests or selection practices which disproportionately impact against handicapped individuals.

Federal courts construing the Rehabilitation Act of 1973 have found that a plaintiff may not prevail on a handicap claim merely by showing that a test or selection procedure disparately impacts against handicapped employees. See Joyner

v. Dumpson, 712 F.2d 770 (2d Cir. 1983) (district court erred in finding that plaintiff's adverse impact theory sufficed to state a prima facie violation of Rehabilitation Act); Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981) ("the statute itself does not contemplate . . . a disparate impact analysis . . . . § 504 sets forth its own criteria for scrutinizing claims"). In light of the fact that the West Virginia legislature relied substantially upon the Rehabilitaiton Act of 1973 in drafting the handicap provisions for the West Virginia Human Rights Act, the Commission should not adopt disparate impact criteria.

Even if a handicap claimant may present a disparate impact claim, the Commission has not correctly stated the law in this area. The West Virginia Supreme Court has recognized that a claimant may present a cause of action under the Act for disparate impact because of race. See Guyan Valley Hosp., Inc. v. W. Va. Human Rights Comm'n, 382 S.E. 2d 88 (W. Va. 1989). However, to prevail in a disparate impact case, the West Virginia Supreme Court held that "the plaintiff must demonstrate that the challenged practice is not fairly linked to job performance." Id. at 91. Rule 5.3.1 is inconsistent with Guyan because it requires an employer to prove that the criteria or test is job-related. Moreover, the Court in Guyan made no reference to the fact that employees may prevail on a disparate impact claim merely by showing an alternative selection procedure that would have a less disparate impact as

provided for in Rule 5.3.2. Because Rule 5.3 mistates the law as established in Guyan, the Coal Association proposes that Rule 5.3 be deleted. The Coal Association believes that the Court's decision in Guyan gives employers adequate guidance in this area and that no other regulation is necessary.

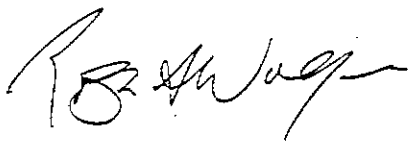
RULE 5.4

The West Virginia Coal Association would also request that the Commission delete the last sentence of Rule 5.4. This sentence provides that "The employer shall supply such adaptive equipment for taking the test as the applicant shall request." This proposed rule requires employers to provide adaptive equipment for tests upon the request of an applicant even if the equipment is not necessary or unreasonably expensive. This sentence has no analog under the regulations for the Rehabilitation Act of 1973. Because Section 5.4 requires employers to make reasonable accommodations in testing, employers should not be required to supply unnecessary adaptive equipment merely upon the whim of an applicant.

Respectfully submitted,

WEST VIRGINIA COAL ASSOCIATION

By Counsel



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HUWV

HANDICAPPED UNITED OF WEST VIRGINIA

6 Diana Drive, Fairmont, West Virginia 26554 (304) 366-3942

April 12, 1990

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WV Human Rights Comm.
Charleston

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APR 16 1990
Charleston Div.

West Virginia Human Rights Commission
215 Professional Building
1036 Quarrier Street
Charleston, West Virginia 25301

Subject: Rules Regarding Discrimination Against the Handicapped

Having read the "Rules Regarding Discrimination Against the Handicapped" I want to offer my congratulations and thanks on behalf of the disabled consumers of West Virginia. The rules are strong, explicit and eminently fair. We hope that through education and consumer activism, doors to the mainstream of society will be opened wide to people with disabilities. With the laws in place and these rules everyone can be made aware of what the limitations are and what needs to be done. Your efforts will enable us to proceed on a firm basis to encourage the doors to open and show how it can be done.

Thank you for a job well done.

Sincerely,

Gretchen H. Anthony

Gretchen H. Anthony
President

Norman / Mike Kelly

Information.

"Joe"

M E M O R A N D U M

TO: Michael Kelly, Esquire
Deputy Attorney General
Civil Rights Division

FROM: West Virginia Coal Association

DATE: April 30, 1990

RE: Supplemental Comments on Proposed Rules Regarding Discrimination Against the Handicapped

As a supplement to its original comments on the Proposed Rules Regarding Discrimination Against the Handicapped, the West Virginia Coal Association, by counsel, respectfully offers the following supplemental proposal and commentary.

REASONABLE ACCOMMODATION

In addition to the proposal that Rule 4.5.4 be modified to further clarify employer obligations, the West Virginia Coal Association proposes that the following language be inserted:

> 4.5A Reasonable accommodation does not require an employer to:
>
> * * * *
>
> 4.5A.4 Accommodate a handicapped individual in a manner that would interfere with an employer's obligations under a collective bargaining agreement or interfere with other employees' legitimate rights under a collective bargaining agreement.

This additional language is consistent with the overwhelming majority of decisions by both state and federal courts holding that employers are absolved of the "reasonable accommodation" obligation where such accommodation is precluded by the terms of a collective bargaining agreement. See, e.g., Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987)(employer bound by collective bargaining agreement and reassignment of employee might interfere with rights of other employees covered by the collective bargaining agreement); Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985)(employer cannot be required to accommodate a handicapped employee by restructuring job in a manner which would usurp legitimate rights of employees under collective bargaining agreement); Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984)(employer had legitimate business reason for discharge of employee pursuant to contractual obligations to employees and their union under collective bargaining agreement); Carty v. Carlin, 623 F.Supp. 1181 (D. N.D. 1985)(reassignment of employee to another position might also violate other employees' rights secured by a collective bargaining agreement); see also Yoho v. Triangle P.W.C., Inc., 336 S.E.2d 204 (W. Va. 1985)(termination of workers' compensation recipient's seniority after absence from work for twelve months, as mandated by facially neutral provision of collective bargaining agreement, was not unlawful).

ESSENTIAL JOB FUNCTIONS

The Commission has also requested that the Coal Association further elaborate on its recommendation that the phrase "[j]ob restructuring" be deleted from Rule 4.5.2 and the following language be substituted: "Modifying nonessential aspects of the job." This proposal is derived from the language in both state and federal regulations which generally define a "qualified handicapped person" as an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question. See, e.g., Rule 4.2, Proposed Rules; 29 C.F.R. §1613.702(f). We have been unable to find any cases defining "nonessential;" hence, to explain the meaning of "nonessential aspects of the job" it is necessary to examine some of those decisions where courts have engaged in an analysis of "essential job functions" in the context of reasonable accommodation requirements.

The seminal case delineating employer responsibilities under the federal Rehabilitation Act is Southwestern Community College v. Davis, 442 U.S. 397 1979). In Davis, the Court held that section 504 of the Rehabilitation Act does not impose a requirement to lower or to effect substantial modification of standards to accommodate a handicapped person. Id. at 413. Furthermore, the Court found that an otherwise qualified person is one who is able to meet the legitimate physical requirements of a program in spite of his or her handicap. Id. at 406.

Correspondingly, courts have uniformly held that an employee/applicant must be able to perform the essential functions of a job without changing the fundamental nature of the job in question. In so finding, courts have traditionally examined "essential job functions" in terms of the specific factual settings presented in those cases. For instance, in Coffman v. West Virginia Board of Regents, 386 S.E.2d 1 (W. Va. 1988), the West Virginia Supreme Court of Appeals held that where a handicapped employee can no longer perform the essential functions of that position, reasonable accommodation does not require the employer to reassign him to another position in order to provide him with work which he can perform. In arriving at this conclusion, the court first analyzed the essential functions of the job at issue by conducting a comprehensive review of the job description and the principle duties associated with that position. Accordingly, the court found that based upon the record evidence, Ms. Coffman "could not perform the essential lifting and bending requirements of her job." Id. at 4, n. 10.

Moreover, in Jasany v. United States Postal Service, the court held that the employer was not required to accommodate the plaintiff by eliminating one of the essential functions of his job. 755 F.2d at 1250. The court in Jasany reviewed the essential functions of the job at issue, which consisted of operating a mail sorting machine. The employee who suffered from a mild case of crossed eyes, contended that

the Postal Service could have accommodated his condition by reassigning him to a job that required no visual scanning. The court rejected this suggestion on the grounds that such accommodation would constitute the elimination of an essential function of the job: "[v]isual acuity was an explicit and prominent requirement of the job for which Jasany was hired." Id. at 1251.

The question of what constitutes essential job functions was the primary issue in Simon v. St. Louis County, Mo., 735 F.2d 1082 (8th Cir. 1984), where the Eighth Circuit had a second opportunity to review a police department's refusal to reinstate a parapalegic officer because he could not satisfy the two department requirements for commissioned officers that: (1) officers be able to effect a forceful arrest; and (2) officers be able to transfer among all positions within the department. In its earlier decision in 1981, the Eighth Circuit reversed the district court's holding and directed that the lower court consider whether the requirements at issue were "reasonable, legitimate, and necessary requirements for all positions within the department," and "[i]f not uniformly required, they should not be considered actual requirements for all positions." Simon v. St. Louis County, 656 F.2d 316, 321 (8th Cir. 1981) cert. denied, 455 U.S. 976 (1982). In its second decision, the Eighth Circuit upheld the district court's findings that the challenged requirements were in fact necessary and legitimate

criteria for an effective police force, and the department's refusal to modify them to accommodate plaintiff was not discriminatory. 735 F.2d at 1084-85.

The Simon court's discussion of "essential job functions" is consistent with other judicial interpretation of this phrase. See, e.g., Carter v. Tisch, 822 F.2d at 467 (no accommodation required where employee could not perform "the full duties of a laborer-custodian"); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983)(in view of functional job requirements, such as physical requirements of job and environmental factors essential to the position, employee was not qualified; employer not required to reassign arduous duties of a park technician to other technicians); Dexler v. Tisch, 660 F.Supp. 1418 (D. Conn. 1987)(inability of applicant suffering from achondroplastic dwarfism to do "many of the tasks required by the position," prevented applicant from being qualified for the job); Pineiro v. Lehman, 653 F.Supp. 483 (D. Puerto Rico, 1987)(employee could not meet legitimate physical requirements of the job and employer not required to substantially change duties of a criminal investigator); Bento v. I. T. Q. Corp., 559 F.Supp. 731 (D.R.I. 1984)(employer not required to overlook disabilities of handicapped employee when affliction relates to reasonable criteria for employability in a particular post).

In sum, to determine whether job functions are "essential" or "nonessential," it is necessary to examine on a case-by-case basis the nature of the work in question,

including all duties and tasks that are integral to the job position. To be classified as "essential job functions," these job criteria must be uniformly applied and must be reasonable, necessary and legitimate requirements for the position in question.

Respectfully submitted,

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