WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

FILED

1990 FEB 26 PM 2:57

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

RULE TYPE: Procedural ; CITE AUTHORITY W.Va. Code § 5-11-8(h) and § 29A-3-3(a).

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: Practice and Procedure Before The West Virginia Human Rights Commission

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

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: 4 April 1990 TIME: 1:30 p.m.

LOCATION OF PUBLIC HEARING: West Virginia Human Rights Commission
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: WV Human Rights Commission
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

TELELPHONE 304-348-2616

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 Procedural Rules and Regulations to your office. These Rules and Regulations are intended to replace the Procedural Rules currently in effect.

I have reviewed these Rules and 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

FISCAL NOTE FOR PROPOSED RULES

Rule Title: § 77-2-1 Practice and Procedure Before the West Virginia Human Rights Commission

Type of Rule: ____ Legislative ____ Interpretive X 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 proposed rule is procedural only and will not have any fiscal impact on the West Virginia Human Rights Commission.

3. Objectives of these rules:

To improve practice and procedure before the West Virginia Human Rights Commission and to implement the 1989 procedural amendments to the West Virginia Human Rights Law, W. Va. Code § 5-11-1 et seq.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

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

None

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 practice and procedure before the West Virginia Human Rights Commission. It corrects flaws in the current rule and, also, implements the 1989 legislative procedural amendments to the West Virginia Human Rights Law, W. Va. Code § 5-11-1 et seq.

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§77-2-1. GENERAL

1.1. Scope - The following procedural regulations set forth the practice and procedure established by the WV Human Rights Commission for carrying out its responsibilities in the administration and enforcement of the WV Human Rights Act, WV Code Chap. 5-11-1, et. seq., as amended.

1.2. Policy - All persons before the West Virginia Human Rights Commission shall have their rights, privileges, or duties determined with due regard for fundamental fairness. Any person may be represented by private legal counsel at any stage of proceedings before the Commission, except as more fully set forth in these rules. In any contested case before the Commission, all parties thereto shall be provided with an adequate notice of hearing; fair hearing; and an objective decision supported by substantial evidence.

1.3. Authority - These regulations are issued under authority of West Virginia Code, Chapter 5, Article 11, Section 8, subsection h, in accordance with the provisions of Chapter 29A, Article 3, of the West Virginia Code.

1.4. Filing Date - These regulations were promulgated on the ____ day of _____ and filed on the _____ in the Secretary of State's Office.

1.5. Effective Date - These regulations become effective on the ____ day of _____ 19___, and shall apply to all complaints now pending and those hereafter filed.

1.6. Procedure Governed - These regulations shall govern all practice and procedure before the West Virginia Human Rights Commission unless otherwise directed by the Commission.

1.7. Liberal Construction - These regulations shall be liberally construed to permit the Commission to discharge its statutory functions and to secure just and expeditious determination of all matters before the West Virginia Human Rights Commission.

1.8. Deviation from Regulations - In special cases, where good cause appears, not contrary to statute, the Commission or its Hearing Examiner may permit deviation from these regulations insofar as it may find compliance therewith to be impractical or unnecessary.

1.9. Practice Where Regulations Do Not Govern - In situations where these regulations do not apply, the Commission's or its Hearing Examiner's discretion shall be exercised in accordance with traditional notions of fairness and justice.

1.10. Severability - If any of these regulations be held invalid, it shall not be construed to invalidate any of the other provisions of these regulations.

1.11. Availability of Regulations - The regulations of the Commission shall be on file in the Office of the Secretary of State.

1.12. Additional Copies - Additional copies of the regulations of the Commission shall be available to the general public at the offices of the Secretary of State.

1.13. Delegation of Powers and Duties - Except where contrary to law, the Commission may delegate any of the powers and duties of the Commission to the Executive Director, Hearing Examiner, employees or agents of the Commission.

1.14. Effect of Amendments to the Act - In the event that the Human Rights Act, West Virginia Code, Chapter 5, Article 11, is amended by the Legislature, these rules and regulations will automatically be amended to conform to such amendments.

§77-2-2. DEFINITIONS.

All words defined in Chapter 5, Article 11, Section 8 of the Act shall have the meanings therein ascribed to them for the purposes of these regulations. All other words shall have the meanings herein ascribed to them.

2.1. The term "Act" shall mean the West Virginia Human Rights Act.

2.2. The term "Answer" means that response required in Rule 6.1.

2.3. The term "Chairperson" shall mean the Chairperson of the Human Rights Commission elected by the Commissioners.

2.4. The term "Chief Legal Clerk" means that person upon whom service shall be made when service on the Commission or Chairperson is required in these rules.

2.5. The term "Commissioner" shall mean one of the duly appointed members of the Human Rights Commission.

2.6. The term "Commission's Attorney" shall mean an attorney on the staff of the Commission or from the Office of the Attorney General who renders legal services to the Commission.

2.7. The term "complaint" shall mean a written statement signed under oath before a notary public and filed with the Commission alleging an unlawful discriminatory practice in conformance with Rule 3.4.

2.8. The term "complainant" shall mean any individual, any organization which has an individual member claiming to be aggrieved by unlawful discrimination, the Commission, or the Attorney General filing a complaint with the Commission.

2.9. The term "Compliance Director" shall mean any member(s) of the staff designated by the Executive Director as having a responsibility in overseeing the activities of compliance functions.

2.10. The term "Hearing Examiner" shall mean that statutory officer referred to in WV Code 5-11-6 or an attorney assigned by the Commission or its ~~Hearing Examiner~~ executive director, to conduct the public hearing or perform other functions authorized by the Act or the Commission's rules and regulations.

~~2.11. The term "hearing panel" shall mean the Commission member and Hearing Examiner appointed in accordance with the provisions of subdivision (d)(3), Section eight of the Act.~~

2.11. Notice - whenever required shall be by personal delivery to the agency or person to be so notified or by depositing such notice in the U. S. Mail, postage prepaid, in an envelope addressed to such agency or person at their last known address. Proof of the giving of notice in either such manner may be made by a signed and dated certificate of the person who delivers or mails said notice.

2.12. The term "party" or "parties" shall mean the complainant, the respondent, the Commission, if appropriate, and any person authorized by the Commission to intervene in any proceeding.

2.13. The term "personal service" when required by these rules shall be that service as is described in Rule 4 of the WV Rules of Civil Procedure.

2.14. The term "reply" means that response required in Rule 4.2.

2.15. The term "respondent" shall mean any person against whom a complaint has been filed alleging an unlawful discriminatory practice within the meaning of the Act.

2.16. The term "service," unless otherwise required, shall be complete upon mailing and proof of service shall be a signed and dated certificate attached thereto by the party or their attorney.

§77-2-3. COMPLAINTS: CONTENTS, FILING, AMENDMENT, TIME, WITHDRAWAL, AND DISMISSAL

~~3.1.~~ **~~Who May File~~** -

3.1. ~~(a)~~ Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a verified complaint in writing.

3.2. ~~(b)~~ Any employer, whose employees, or some of them hinder or threaten to hinder compliance with the provisions of the Act may make, sign and file with the Commission a verified complaint requesting assistance by conciliation or other remedial action.

3.3.~~(c)~~ The Commission or the Attorney General may make, sign and file a complaint whenever either has reason to believe that any person has engaged, or is engaging, or proposes to engage in an unlawful discriminatory practice.

3.4.~~(d)~~ Any organization which has an individual member claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a verified complaint in writing.

3.5.~~(e)~~ A complaint deferred/referred to the Commission by the United States Equal Employment Opportunity Commission pursuant to the Civil Rights Act of 1964 or by the United States Department of Housing and Urban Development pursuant to the Civil Rights Act of 1968 shall be deemed filed with the Commission as of the date such complaint was received by the Equal Employment Opportunity Commission or the Department of Housing and Urban Development.

3.6.2 ~~Complaint Assistance~~ - Assistance in drafting and filing complaints shall be available to complainants at the Commission's offices or through the Commission and its staff.

3.7.~~3~~ ~~Complaint Form~~ - The complaint shall be in writing, the original being signed and verified before a notary public or other person duly authorized to administer oaths and take acknowledgements. The complaint shall be filed with the Commission and where feasible, shall be upon forms prepared by the Commission, blanks of which shall be supplied by the Commission upon request. Notarial service shall be furnished without charge by the Commission.

3.8.4 ~~Contents~~ Each complaint shall contain the following to the best information of the complainant:

3.8.1.~~(1)~~ The name and address of the complainant.

3.8.2.~~(2)~~ The name and address of the respondent.

~~(3) A concise statement of the facts which complainant believes indicates an unlawful discriminatory practice.~~

3.8.3. A concise statement setting forth the facts deemed to corroborate the alleged discrimination.

3.8.4.~~(4)~~ The date or dates of the alleged unlawful discriminatory practice; or if the alleged unlawful discriminatory practice is of a continuous nature, the dates between which said continuous acts are alleged to have occurred.

3.8.5.~~(5)~~ The notarized signature of the complainant.

3.9.~~5~~ Manner of Filing

3.9.1.~~(a)~~ ~~Where to File~~ - Complaints may be filed at any Commission office either by personal delivery or mail.

~~(b) What Constitutes Filing - The complaint shall be deemed filed as of the date of:~~

3.9.2. The complaint shall be deemed filed as of the date of receipt at the Commission's office.

~~(1) The postmark, if the complaint is filed by mail, or its receipt at the Commission's office if no postmark is visible;~~

~~(2) Receipt at the Commission's office if filed by personal delivery.~~

~~(c) Verification of Receipt of Complaint - When a complaint is received at the Commission office, the person accepting the complaint shall stamp the complaint with the date it was filed and initial the filing stamp.~~

3.9.3. When a complaint is received at the Commission office, the person accepting the complaint shall stamp the complaint with the date it was so received.

3.9.4.~~(d)~~ Timely Filing of Complaint -

~~(1) Ninety-day limitation - The complaint shall be filed within ninety (90) days after the occurrence of the alleged unlawful discriminatory practice or act.~~

3.9.4.a. One Hundred Eighty-Day Limitation - The complaint shall be filed within one hundred eighty (180) days after the occurrence of the alleged unlawful discriminatory practice or act.

3.9.4.b.~~(2)~~ Continuing Wrong - If the alleged unlawful discriminatory practice or act is of a continuing nature, the date of the occurrence of said alleged unlawful practice shall be deemed to be any date subsequent to the commencement of the alleged unlawful practice up to and including the date upon which the unlawful practice has ceased.

3.9.4.c.~~(3)~~ Memorandum of Complaint - Where the Commission is informed by an individual, who is claiming to be aggrieved and who has given sufficient information, as set forth below prior to the expiration of the ~~ninety (90)~~ one-hundred eighty-day (180) limitation of an alleged violation of the Act, the Commission may institute a Memorandum of Complaint. Such Memorandum of Complaint shall contain the essential elements of a complaint as required by these regulations, excepting signature and verification by the complainant, and shall be signed, dated and verified before a notary public or other person duly authorized to administer oaths and take acknowledgements by the person drafting such Memorandum of Complaint. A complaint received by the Commission subsequent to and based upon said Memorandum of Complaint shall be deemed filed as of the date of said Memorandum of Complaint.

3.9.4.d.~~(4)~~ Timeliness of Federal Agency Deferrals - Any complaint alleging acts which are unlawful under the West Virginia Human Rights Act which are filed with federal agencies which have deferral/referral arrangements with the Commission, shall be deemed filed with the Commission on the same day as the complaint was received by such federal agency.

3.9.4.e. In computing any period of time prescribed or allowed by these rules or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation period.

~~3.6~~ Amendments

3.10.~~(a)~~ The Commission or the complainant may amend a complaint or any part thereof to cure technical defects or omissions, including but not limited to, failure to verify the complaint, or to clarify and amplify allegations made therein, when such amendments relate back to the original filing date; provided however, an amendment alleging additional acts constituting unlawful discriminatory practices not related or growing out of the subject matter of the original complaint will be permitted only where at the date of the amendment the allegations could have been timely filed as a separate charge.

3.11.~~(b)~~ A complaint may be amended prior to a finding of probable cause, and thereafter for good cause shown at the discretion of the Hearing Examiner.

~~3.7~~ Reserved

3.12.8 Notice to Respondent - Upon the filing of a complaint or amended complaint, the Commission shall promptly serve the respondent with a copy thereof together with a notice setting forth the requirements in Rule 4.2.1.

~~3.9~~ Withdrawal of Complaint -

3.13.~~(a)~~ Upon written notice to the Commission or Hearing Examiner if the case has been noticed for public hearing, a complainant may withdraw the complaint. A complainant may withdraw a complaint at any time.

3.14.~~(b)~~ Upon such withdrawal of complaint, the Commission may initiate its own complaint based on the allegations of the withdrawn complaint. The filing date of such Commission-initiated complaint shall relate back to the original filing date of the withdrawn complaint.

~~3.10~~ Dismissal of Complaint -

3.15. Involuntary dismissal of the complaint is proper under the following circumstances:

3.15.1.~~(a) Jurisdictional Dismissal~~ - Whenever it appears upon investigation of a complaint that the Commission lacks jurisdiction over the parties or the subject matter of the complaint, the Commission shall dismiss the complaint without further action, except as provided in Rule 4.8~~(d)~~.

3.15.2.~~(b) Administrative Dismissals~~ - The Commission may upon its own initiative dismiss a complaint for the following reasons:

3.15.2.a.~~(1)~~ A showing of discharge in bankruptcy of the respondent or that the complainant no longer has a right to file as a creditor or that such filing would be unproductive.

3.15.2.b.~~(2)~~ Failure to locate the complainant; provided~~:~~ that reasonable effort has been made by the Commission's staff to locate the complainant. ~~Such effort shall include the following:~~

Such effort may include the following:

3.15.2.b.A.~~(i)~~ Verification from the WV Department of Motor Vehicles of the party's last known address;

3.15.2.b.B.~~(ii)~~ Return of certified and regular mail stating that the party has moved and left no forwarding address;

3.15.2.b.C.~~(iii)~~ Requesting address information from the complainant's contact person listed in the "Background Information" forms;

~~(3) Complainant's failure or refusal to cooperate - Upon refusal by complainant to cooperate with the processing of the complaint or otherwise to cooperate with the Commission's staff, the complainant shall be notified via certified mail or by service of a Subpoena Duces Tecum, that failure to provide the Commission with information sought within ten days of receipt of the letter may result in administrative dismissal of the complainant.~~???

3.15.2.c. Refusal by complainant to cooperate with the processing of the complaint or otherwise to cooperate with the Commission's staff or the Commission's attorney, provided that the complainant shall first be notified and warned via certified mail that continued failure or refusal to cooperate shall result in the dismissal of the complaint.

3.15.2.d.~~(4)~~ Death of the complainant provided the heirs do not wish to proceed.

3.15.2.e.~~(5)~~ Mootness of the allegations of the complaint.

3.15.2.F. Failure of the complaint, when construed in a light most favorable to complainant, and after reasonable investigation to state facts upon which relief can be granted under statute.

3.15.3.~~(e)~~ In instances of jurisdictional or administrative dismissal, complainant, and respondent where the complaint has been served, shall be notified in writing of the disposition of the complaint together with the reasons therefor and the complainant shall be notified of the right of administrative review as provided in Rule 4.14.

3.16.~~4~~ ~~Docketing of Complaint~~ - Docketing of all complaints with the Commission shall be completed promptly.

3.17.~~2~~ ~~Preservation of Records~~ Respondents shall have the duty to preserve the following records.

3.17.1.~~(a)~~ ~~Employment Records~~ - When a complaint has been served on an employer, labor organization or employment agency, the respondent shall preserve all personnel records relevant to the investigation until such complaint is finally adjudicated and the respondent shall be so advised in the notice. The term "relevant to the investigation" shall include, but not be limited to, personnel, employment or membership records relating to the complainant and to all other employees, applicants or members holding or seeking positions similar to that held or sought by the complainant, and application forms or test papers completed by any unsuccessful applicant and by all other applicants or candidates for the same position or membership as that for which the complainant applied and was not accepted and any records which are relevant to the scope of the investigation as defined in the notice or complaint.

3.17.2.~~(b)~~ ~~Housing, Membership Club, and Public Accommodation Records.~~
Where a complaint or notice of investigation has been served on a membership club, respondent in housing complaint, or public accommodation complaint under WV Code Chap. 5-11-9(b), the respondent shall preserve all records relevant to the investigation until such complaint is finally adjudicated and the respondent shall be so advised in the notice. The term "relevant to the investigation" shall include, but not be limited to, applications on file at the time the complaint was filed and those received following service of the complaint whether or not they have been accepted or rejected, membership lists, records of payment of initiation fees or regular dues, together with the minutes of meetings of the club conducted in conformity with the constitution or by-laws adopted by the membership.

3.17.3.~~(c)~~ ~~Other Records~~ - Any other books, papers, documents, or records of any form which are relevant to the scope of any investigation as defined in the notice or complaint shall be preserved during the pendency of any proceedings by all parties to the proceedings unless the Commission specifically orders otherwise.

3.17.4.~~(d)~~ Violation of this rule may result in prosecution as provided in WV Code Chap. 5-11-14.

§77-2-4.RULE 4. Investigation And Conciliation

4.1 ~~Timely Investigation~~ -

4.1. After a complaint has been filed, the Compliance Director shall within 75 days but not to exceed 150 days conduct a prompt investigation of the allegations of the complaint.

~~4.2 Investigatory -~~

~~(a) Any person against whom a complaint has been filed shall serve upon the Commission and complainant a written reply to the complaint within 10 days of receipt of the complaint. Such reply shall contain a statement of the facts and circumstances surrounding the allegations contained in the complaint and may present any documents or other evidence related to the subject matter of the complaint. This reply is in addition to the verified answer required in Rule 6.1.~~

4.2. Any person against whom a complaint has been filed shall serve upon the Commission and complainant a written reply to the complaint within 10 days of receipt of the complaint. Such reply shall contain a statement of the facts and circumstances surrounding the allegations contained in the complaint and may present any documents or other evidence related to the subject matter of the complaint.

4.3.~~(b)~~ The Commission may by interview or deposition take the testimony of any person, including a party, relating to the subject matter of a complaint. Any person making a statement may obtain a copy of that statement.

4.4.~~(c)~~ The Commission may order any person, including a party, to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, or other tangible things, not privileged, which may constitute or contain evidence relating to the subject matter of a complaint.

~~(d) The Commission may order any party to complete a questionnaire or interrogatories relating to the subject matter of a complaint. Such questionnaire or interrogatories shall be completed and returned to the Commission within ten (10) days of receipt thereof. For good cause, the Compliance Director may grant an extension of time for its completion and return.~~

4.5. The Commission may order any party to complete a questionnaire or interrogatories relating to the subject matter of a complaint. Such questionnaire or interrogatories shall be completed and returned to the Commission within ten (10) days of receipt thereof. For good cause, the Compliance Director may grant an extension of time for its completion and return up to 7 calendar days, at his/her discretion.

4.6.~~(e)~~ To effectuate the purposes of the Act, whenever possible the Commission will obtain documentary evidence, statements, and testimony from witnesses, depositions, questionnaires and interrogatories by voluntary compliance with the request of the Commission for such discovery. However,

if there is non-compliance with such voluntary requests for discovery, such actions shall, at the discretion of the Executive Director, result in the application of an adverse inference against the party to whom the request for discovery is propounded regarding all unanswered inquiries. If it is decided to apply such adverse inference against a party, such party must be notified of this action in writing.

4.7. ~~(f)~~ If there has been non-compliance with the request of the Commission for such discovery, ~~upon the concurrence of at least five members of the Commission,~~ the Executive Director or the Chairperson may issue subpoenaes and subpoenaes duces tecum in the name of the Commission for the purpose of obtaining any information relevant to any lawful activity of the Commission. Such subpoenaes may be signed by the Chairperson, or his representative in his absence and/or the Executive Director.

~~(f) If the Commission conducts an interview of any person at the place of work of that person, the Commission shall conduct the interview so as not to interfere with the party's duties and responsibilities to his employer.~~

4.8. If the Commission conducts an interview of any person at the place of work of that person, the Commission shall conduct the interview so as not to interfere with the party's duties and responsibilities to his employer. Where the Commission conducts such interviews, the employer shall be given reasonable notice. Failure of the employer to cooperate subjects the employer to the penalties described in WV Code §5-11-14.

4.9. ~~3~~ **~~Settlement During Investigation~~** - If during the investigation of a complaint, terms of settlement are agreed to between complainant and respondent, the same shall be reduced to writing, signed by the parties and attached to a withdrawal executed by the complainant. Whereupon the case shall be closed.

~~4.4~~ **~~Finding of No Probable Cause~~** -

4.10. ~~(a)~~ The Compliance Director or Commission's Attorney shall authorize a ruling dismissing a complaint when it has been determined after an investigation of the allegations of such complaint that there is no probable cause to believe that respondent has engaged in an unlawful discriminatory practice. A copy of a ruling dismissing a complaint shall be served upon the complainant and respondent within ten (10) days of such determination. The ruling shall contain notice of the complainant's right to review under Rule 4.14. Such ruling shall be a final decision of the Commission unless a review is taken as provided in Rule 4.14.

~~(b) If the Compliance Director or the Commission's Attorney rules that there is no probable cause to credit the allegations of an individual complainant as such allegations pertain to that individual, but also rules that there is probable cause to credit allegations or findings of a pattern and practice of discrimination by the respondent, no matter whether such pattern and practice was alleged by complaint or discovered through investigation, in such case the individual complainant shall be dismissed from further proceedings by the Commission (pending any appeal taken under Rule 4.8), the Commission shall go forward in the name of the Commission as provided in Rule 4.5 below.~~

4.11. If the Compliance Director or his/her designee rules that there is no probable cause to credit the allegations of an individual complainant as such allegations pertain to that individual, but also rules that there is probable cause to credit allegations or findings of a pattern and practice of discrimination by the respondent, no matter whether such pattern and practice was alleged by complainant or discovered through investigation, in such case the individual complaint shall be dismissed from further proceedings by the Commission (pending any appeal taken under Rule 4.8), and the Commission shall go forward in the name of the Commission as provided in Rule 4.5 below.

4.12.~~4.5~~ Finding of Probable Cause - If the Compliance Director or Commission's Attorney finds that probable cause exists for crediting the allegations of the complaint, the Commission shall promptly notice the case for public hearing. The Commission encourages settlement efforts during any phase of its procedures.

~~4.6 Confidentiality of Conciliation Endeavors -~~

4.13. When Conciliation or Mediation is Attempted:

4.13.1.~~(a)~~ Nothing that is said or done during and as a part of the endeavors of the Commission to eliminate unlawful discriminatory practices by methods of conference, conciliation, mediation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the parties concerned: PROVIDED, That the Commission may publish the terms of a conciliation agreement when the complaint has been settled without disclosing the identities of the parties involved.

4.13.2.~~(b)~~ This sub-section does not apply to such disclosures to the representatives of federal, state, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Act: PROVIDED, That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstance where the disclosures will not serve the purposes of the effective enforcement of the Act.

4.13.3.~~(e)~~ The requirements of this sub-section shall not be construed to limit the power of the Commission to conduct further investigations in preparation for a hearing or for other purposes in connection with its statutory duties nor shall they be construed to prohibit the use of evidence obtained through such investigations.

4.13.4.4.~~7~~ ~~Violation of Settlement Agreement~~ - If the Commission determines that either party or its agent or assigns has violated or is violating the terms of settlement and adjustment, the Commission or any party may initiate action in the Circuit Court of the county where the respondent resides or transacts business, as set forth in WV Code §5-11-8(d)(5) or may take any action consistent with the Act which it deems appropriate.

~~4.8~~ ~~Request for Review~~ -

4.14. The following procedures shall apply when a complaint is dismissed:

4.14.1.~~(a)~~ A complainant may apply to the Commission, through its compliance director, for an administrative review of the dismissal of his/her complaint. Requests for review shall be in writing, shall state specifically the grounds relied on and may contain new evidence not previously considered by the Commission and shall be filed at the Commission office within ten (10) days from the date of receipt of the notice of dismissal of the complaint.

4.14.2. The Commission will forward a copy of the request for administrative review of a dismissal and any material in support thereof to the respondent, who may respond thereto within ten (10) days of receipt of such copy.

4.14.3. The matter will be referred to a Commission's Attorney who will consider any new evidence and secure new information as may be necessary and appropriate.

4.14.4.~~(1)~~ The complainant and respondent shall be given at least ten (10) days written notice of the time and place of the review hearing. The notice shall be given by personal delivery or by certified mail, return receipt requested, and shall advise the complainant that he/she must be present at the review hearing and may be accompanied by counsel.

4.14.5.~~(2)~~ If after having received proper notice, the complainant does not appear at the review hearing, the complainant shall be deemed to have waived all rights to administrative review unless it is shown to the satisfaction of the Chairperson that the failure to appear was due to circumstances beyond the complainant's control.

~~(b) Proceedures for Review~~ -

4.14.6. The review process shall be conducted as follows:

4.14.6.a.~~(1)~~ All decisions and actions growing out of or upon any such ~~hearing~~ review shall be reserved for determination by the Chairperson or Executive Director.

4.14.6.b.~~(2)~~ Commission's Attorney shall preside at the review hearing and shall be provided with all information in the Commission file pertaining to the complaint under review. In the discretion of the Commission's attorney, testimony taken at such review ~~hearing will not~~ may be transcribed or taken under oath or affirmation. The complainant shall have the burden of showing that the dismissal of the complaint is arbitrary, capricious, or not in accordance with law. The Commission's Attorney after considering the evidence, shall file a report and recommendation with the executive director which shall recommend that the dismissal of the complaint be upheld, reversed, modified or remanded for further investigation.~~will hear the evidence, recommend a further investigation, and file a report and recommendation with the Chairperson or Executive Director.~~

4.14.6.c.~~(c)~~ If, upon administrative review of a complaint dismissed upon a finding of no probable cause, Commission's Attorney determines that probable cause exists to credit the allegations of the complaint, a recommended finding of probable cause will be made and reported to the Chairperson or Executive Director. The Chairperson or Executive Director may reopen the case or may make such other disposition as he/she deems appropriate. ~~If the case is reopened, the matter will thereafter proceed in accordance with Rule 4.5 and Rule 5.1 of these rules.~~

4.14.6.d.~~(d)~~ If, upon administrative review of a complaint dismissed upon a finding of no jurisdiction, Commission's Attorney determines that jurisdiction exists to investigate the complaint, a finding of jurisdiction will be made and reported to the Chairperson or Executive Director. Thereafter, the case will proceed as if it had not been dismissed.

4.14.6.e.~~(e)~~ If, upon administrative review of a complaint dismissed upon a finding of no probable cause, Commission's Attorney determines that no probable cause exists to credit the allegations of the complaint, a recommended finding of no probable cause will be made and reported to the Chairperson or Executive Director.

4.14.6.f. If the Chairperson or Executive Director determines that the original finding of No Probable Cause should be upheld, the complaint shall be dismissed and the complainant and the respondent shall be sent notice of such finding by certified mail, return receipt requested. The determination of the chairperson or executive director shall be final.

~~4.9 Conciliation Between Commission and Respondent.~~

4.15. The Commission Has the Statutory Authority to Conciliate All Complaints.

4.15.1.~~(a)~~ If, after a reasonable investigation, the respondent and the commission agree upon conciliation terms, the commission shall serve upon the complainant a copy of the proposed conciliation agreement. If the complainant agrees to the terms of the agreement, or fails to object to such terms, in writing, within fifteen days after its service upon him, the commission shall issue an order embodying such conciliation agreement.

If the complainant objects to the agreement, he shall serve a written specification of his objections upon the commission within fifteen days after the proposed conciliation agreement was served upon him. Unless such objections are met or withdrawn within ten days after service thereof the commission shall:

4.15.1.a. End its conciliation efforts and notice the complainant for hearing, or

4.15.1.b. Upon a finding by the commission or its executive director that the terms of the proposed conciliation agreement are in the public interest, execute the agreement despite complainant's objections and notice the parties for hearing solely as to the merits of the complainant's objections to the agreement. The agreement may be executed on behalf of the commission by its executive director.

4.15.2. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and shall contain such further provisions as may be agreed upon by the commission and the respondent.

4.15.3 Not later than one year from the date of a conciliation agreement, the commission shall investigate whether the respondent is complying with the terms of such agreement. Upon a finding of noncompliance, the commission shall take appropriate action to assure compliance.

4.15.4. If, after a hearing regarding the merits of the complainant's objectives to the conciliation agreement, the hearing examiner finds that the agreement, when compared to the merits of complainant's underlying case, is arbitrary, capricious, an abuse of discretion or based upon incorrect assessments of facts or conclusions of law, the hearing examiner may void the agreement and schedule a public hearing on the complaint.

77-2-5. NOTICE OF HEARING AND CONTINUANCES

~~5.1. Issuance and Service of Notice of Public Hearing~~ -

5.1. After a finding of Probable Cause to credit the allegations of the complaint the Commission shall cause to be issued and served in the name of the Commission, a written notice of hearing, together with a copy of the verified complaint, as the same may have been amended. Service of said notice and complaint upon the respondent shall be in the manner provided by law for the service of summons in civil actions and shall be served at least thirty (30) days prior to the time set for the hearing. Service upon other parties shall be by personal delivery or certified mail, return receipt requested.

5.2. Notice of the hearing shall be issued no later than the 76th day after docketing, if probable cause has been determined, but in any event a notice of hearing shall be issued no later than the 150th day after docketing.

~~5.2 Contents of Notice of Public Hearing~~ -

5.3. The notice of hearing shall state the time and place of the hearing, inform the respondent that he/she shall file a written, verified answer to the complaint, and that a failure to answer may be deemed an admission to the allegations of the complaint.

5.4. The respondent and complainant shall be advised in writing of the right to appear at such hearing in person and/~~or~~ be represented by an attorney. If an attorney has previously appeared in this action on behalf of a party, a copy of the notice of hearing and complaint, as the same may have been amended, shall be furnished to said attorney.

5.5. The notice of hearing shall contain a statement that the public hearing will be conducted by a hearing ~~panel~~ examiner whose name will be designated or will be subsequently designated by the Commission's Chairperson or Executive Director.

5.6. ~~Continuances~~ The grant or denial of continuances lies within the sound discretion of the Hearing Examiner, balancing the inconvenience and unfairness to others and the public interest of the State of West Virginia against the asserted hardship to the requesting party should the continuance be denied:

5.6.1. For good cause shown the Hearing Examiner may grant a continuance on the application of any party. If a continuance is granted, costs incurred on account of the continuance may be assessed against the party moving for the continuance at the discretion of the Hearing Examiner.

5.6.2. Motions for continuances shall be filed without delay with the Hearing Examiner after the grounds therefore become known to the party.

5.6.3. All such motions for continuance shall be in writing and must be supported by ~~affidavit of the party or the party's attorney~~ a showing of good cause why the request should be granted.

5.6.4. It is the responsibility of the party requesting a continuance to duly serve on all other parties the motion for continuance. Objections raised to the filing of such motion shall be submitted in writing to the Hearing Examiner within five (5) days of receipt of said motion for continuance.

5.6.5. Oral motions for continuance will only be allowed when the ~~other~~ opposing party, or the agent for the ~~other~~ opposing party, or the ~~other~~ opposing party's attorney ~~have~~ has been notified, and when the Hearing Examiner is satisfied that ~~(a)~~ there is no time for a written motion, and (2) ~~(b)~~ the lateness of the motion was not caused by undue delay or lack of diligence by the moving party. If the motion for continuance is oral, the resistance may be oral, but both must be committed to writing for the record.

5.6.6. Written notice of the grant or denial of a continuance request shall be provided to all parties by the Hearing Examiner.

5.6.7. Within five (5) days of the notice of a grant of continuance, the Hearing Examiner will cause to be served on all parties an order setting forth the alternative date for said hearing to convene.

5.7. ~~Copies of Pleadings to All Parties~~ - Copies of all pleadings and papers filed in connection with a public hearing shall be served on all parties, and/or their attorneys, and the Hearing Examiner by the party filing such pleadings or papers.

~~RULE 6.~~77-2-6. ANSWER

6.1. ~~Time of Filing~~ - The respondent against whom a verified complaint, as the same may have been amended, is filed and upon whom a notice of hearing and a copy of such complaint has been served, shall file a written verified answer in person or through an attorney within ten days from the service of such complaint and notice of hearing. Upon application in writing made to the Hearing Examiner prior to the end of said ten-day period, Hearing Examiner may, for good cause shown, extend the time in which the answer shall be filed.[1/]

6.2. ~~Manner of Filing~~ - The filing shall be by personal delivery or by certified mail, return receipt requested to the Hearing Examiner, and by personal delivery or first class mail to all parties.

6.3. ~~Form of Answer~~- The answer shall be in the following form:

6.3.1. ~~(a)~~ The answer shall be in writing, the original being signed and verified by the respondent or respondent's attorney. The answer shall contain the post office address of the respondent and if he is represented by an attorney, the name, mailing address, and telephone number of said attorney.

6.3.2.~~(b)~~ The answer shall contain a general or specific denial of each and every allegation of the complaint controverted by the respondent or a denial of any knowledge or information thereof sufficient to form a belief and a statement of any matter constituting a defense.

6.3.3~~(c)~~ Any allegation in the complaint which is not denied or admitted in the answer, unless the respondent shall state in the answer that he is without knowledge or information sufficient to form a belief, may be deemed admitted.

6.3.4.~~(d)~~ Any allegation of new matter contained in the answer shall be deemed denied by the complainant without the necessity of a reply being filed, unless otherwise ordered by the Hearing Examiner.

1/ This answer is an additional requirement from the reply required in Rule 4.2.

6.4. ~~Amendment of Answer~~ - The answer or any part thereof may be amended at the discretion of the Hearing Examiner on application duly made.

6.5. ~~Amendment of Answer Upon Amendment of Complaint~~ - In any case where a complaint has been amended, the respondent shall have the opportunity to amend his/her answer within such period as may be fixed by the Hearing Examiner.

6.6. ~~Failure to File Answer Or Appear~~ - The hearing ~~panel~~ examiner may proceed, notwithstanding any failure of the respondent to appear or to file an answer within the time provided herein, to hold a hearing and may make ~~its~~ findings of fact and enter ~~its~~ an appropriate order upon the testimony taken at the hearing.

#71-2-7

~~RULE 7.~~ HEARINGS, COUNSEL, SUBPOENAS, DISCOVERY, AND PROCEDURE

7.1. ~~Public Hearing~~ - All hearings ~~of the Hearing Panel~~ shall be open to the public except in extraordinary circumstances where the hearing ~~panel~~ examiner shall determine, with the consent of the parties to the hearings, that substantial justice would not be effectuated thereby.

7.2. ~~Place of Hearing~~ - Hearings shall be held in the county where the respondent resides or transacts business, or, when agreed to by the parties, where the acts complained of occurred or any other mutually agreeable place. The place of the hearing will be designated by the Hearing Examiner.

7.3. ~~Joinder~~ - In the discretion of the Hearing Examiner two or more proceedings against the same respondent arising out of the same set of circumstances, or two or more proceedings by the same complainant against two or more respondents arising out of the same set of circumstances, may be consolidated for the purpose of hearing.

~~7.4~~ ~~Hearing Panel~~ -

~~(a) Hearings shall be conducted by one Hearing Commissioner and a Hearing Examiner designated by the Chairperson or the Executive Director. The Hearing Examiner shall preside and conduct the hearing; the Hearing Commissioner may participate fully in such hearing.~~

7.4. Hearings shall be conducted by a Hearing Examiner designated by the Chairperson or the Executive Director. The Hearing Examiner shall preside and conduct the hearing.

7.4.1.~~(b)~~ The ~~qualifications~~ conduct of the hearing ~~panel~~ examiner shall, where applicable, be guided by the Judicial Code of Ethics.

~~Any party may file in good faith a motion alleging that a member of the hearing panel hearing examiner should not be allowed to hear~~

~~the case. The motion shall be determined as part of the record prior to the taking of other evidence.~~

~~(e) The parties may waive the presence of the Hearing Commissioner who shall then not be required to attend or otherwise participate in the hearing.~~

7.4.2. Any party may file in good faith a motion alleging that a hearing examiner should not be allowed to hear the case. The motion shall be determined prior to the taking of other evidence. If the motion is denied, the moving party may file an appeal within ten (10) days after receipt of such written denial to the executive director, whose decision to affirm, reverse or modify the decision of the hearing examiner shall be final. If the motion is granted, any party may appeal to the executive director who may affirm, reverse or modify the decision of the hearing examiner. The decision of the executive director shall be final.

~~(d) On account of illness or other good cause the Hearing Examiner may excuse the Hearing Commissioner from attendance at the hearing.~~

~~7.5~~ Reserved

~~7.6~~ Appearances -

~~(a) Complainant -~~

7.5.~~(1)~~ The complainant shall be present at the hearing unless excused by the Hearing Examiner because of extraordinary circumstances provided, that if the respondent shows that the complainant's absence will cause undue hardship to the presentation of his case, the respondent shall be entitled to a continuance.

~~(2) The complainant shall be permitted to appear either in person or by counsel to present oral testimony or other evidence and to examine and cross-examine witnesses.~~

7.5.1.~~(3)~~ In the event that complainant fails to appear and has not been excused, the Hearing Examiner may proceed with the hearing and take evidence or the Hearing Examiner may take any other action, including but not limited to, recommending dismissal without the taking of testimony.

7.6.~~(b)~~ Respondent - The respondent may appear at the hearing with or without counsel. ~~cross-examine witnesses, submit oral testimony and other evidence.~~ Failure of a respondent to appear shall not prevent presentation of the case before the Hearing Panel or the entering of a final order.

7.7.~~(c)~~ ~~Commission~~ - The case in support of the complaint shall be presented before the Hearing Panel by the Commission's attorney or agent.

who shall have full rights of cross-examination and rebuttal of any witness called by the respondent, complainant, or intervening party. With the consent of the Commission or the Executive Director, after a determination that the Commission has no independent interest in the matter,, the case in support of the complaint may shall be presented solely by the complainant's attorney and the Commission shall not itself be represented by counsel at the hearing.

7.8.(d) Interested Parties - Any person not initially joined in the proceeding shall be permitted to timely petition the Hearing Examiner for intervention by counsel upon the filing of a motion and notice to the parties, which shall set forth the grounds for said intervention. The Hearing Examiner shall rule upon the motion and set forth in an order such matters as may be required.

7.9 **Representation by an Attorney** -

(a) Appearance - If any party designates an attorney-at-law to represent him before the Commission hearing examiner, such attorney shall file a notice of appearance with the Commission hearing examiner. The filing of an answer executed or prepared by an attorney shall constitute a notice of appearance. An attorney-at-law who appears for a party to the proceeding at any stage therein shall be deemed to remain that party's attorney throughout the proceeding until:

7.9.1.(1) The party represented files with the Commission hearing examiner a written revocation of the attorney's authority; or

7.9.2.(2) The attorney files with the Commission hearing examiner a written statement of his withdrawal from the case; or

(3) The attorney states on the record at a Commission hearing that he is withdrawing from the case; or

7.9.3. The hearing examiner receives notice of the attorney's death or disqualification.

(4) The party represented states on the record at a Commission hearing that he is revoking the attorney's authority; or

(5) The Commission receives notice of the attorney's death or disqualification.

(b) Effectiveness of Service - Service of any document or paper (except subpoenaes and subpoenaes duces tecum) in the matter on such attorney shall be deemed service on the party he/she represents.

7.10. Effectiveness of Service - Service of any document or paper (except subpoenaes, subpoenaes duces tecum, final decisions, final orders) in the matter on such attorney shall be deemed service on the party he/she represents.

~~7.8 Motions Before or After Hearing - All motions other than those made during a hearing shall be in writing and shall state briefly the order or relief applied for and the grounds for such motion. Any such motion made prior to the Hearing Examiner's recommended decision shall be filed with the Hearing Examiner. Any motion made subsequent to the Hearing Examiner's recommended decision shall be filed with the Chairperson. A copy of the motion shall be served at the same time upon the Commission's attorney and other parties to the hearing. Answering statements, if any, shall be filed in writing with the Hearing Examiner or Chairperson, whichever is appropriate, within seven (7) days after service of the motion and a copy thereof shall be served within the same period upon the Commission's attorney and other parties to the hearing. Such motions shall be decided by the Chairperson or by the Hearing Examiner, without oral argument thereon, unless the Chairperson or Hearing Examiner, as appropriate, shall determine to hear oral argument, in which case the parties shall be notified of such fact and of the time and place for such oral argument.~~

7.11. Motions Before or After Hearing - All motions other than those made during a hearing shall be in writing and shall state briefly the order or relief applied for and the grounds for such motion. Any such motion shall be filed with the Hearing Examiner. A copy of the motion shall be served at the same time upon the Commission's attorney and other parties to the hearing. A response, if any, shall be filed in writing with the Hearing Examiner, within five (5) days after service of the motion and a copy thereof shall be served within the same period upon the Commission's attorney and other parties to the hearing. Such motions shall be decided by the Hearing Examiner, without oral argument thereon, unless the Hearing Examiner, as appropriate, shall determine to hear oral argument, in which case the parties shall be notified of such fact and of the time and place for such oral argument. In the discretion of the hearing examiner, oral argument on a motion may be heard by telephone.

~~7.9 Subpoenaes~~

7.12.~~(a)~~ Issuance - Subject to the pertinent provisions of the Act, the Commission may issue subpoenaes and subpoenaes duces tecum either at its own instance or upon written application of a party to the hearing whenever necessary to compel the attendance of witnesses and the introduction of books, records, correspondence, documents, papers or any other evidence which relates to any matter before the Commission.

7.12.1.~~(b) Fees~~ - Where a subpoena is issued at the instance of a party to the hearing, the cost of service, witness and mileage fees shall be borne by the party at whose request the subpoena is issued. Where the subpoena is issued at the instance of the Commission, the cost of such service shall be borne by the Commission. Such witness and mileage fees shall be the same as are paid witnesses in the courts of the State. All requests by parties for subpoenaes and subpoenaes duces tecum shall contain a statement acknowledging that the requesting party agrees to pay such fees.

7.12.2.~~(e)~~ Failure to Obey Subpoena - Subpoenaes and subpoenaes duces tecum shall be enforced as provided in Chap. 29A-5-1(b) of the West Virginia Code.

~~7.10~~ ~~Procedure of Hearing~~

7.13.~~(a)~~ Subject to the provisions of these regulations, the Hearing Examiner shall have full authority and discretion to control the procedure of the hearing, to admit or exclude testimony or other evidence, and to rule upon all motions and objections ~~except where ruling on such motion is expressly reserved to the Commission.~~ The Hearing Examiner may inquire of any witness presented by any party. After notice of the hearing is issued and subject to the provisions of the Act the Hearing Examiner may issue subpoenaes duces tecum in furtherance of his/her duties and responsibilities.

~~(b) Limitation on Hearing Examiner - On any question which would be determinative of the jurisdiction of the Commission, or might otherwise result in the dismissal of the complaint, the Hearing Examiner may recommend proposed findings of law and fact. In that event the Hearing Examiner may proceed to take testimony or close the record but, in either event, need not continue the hearing in order to allow the Commission to rule on any issue.~~

(b) On any question which would be determinative of the jurisdiction of the Commission, or might otherwise result in the dismissal of the complaint, the Hearing Examiner may issue a final decision on the merits accompanied by findings of fact and conclusions of law, either before or after the taking of testimony.

7.13.2.~~(c)~~ ~~Continuation and Adjournments~~ - The Hearing Examiner may continue a hearing from day to day or adjourn it to a later date or to a different place by announcement thereof at the hearing or by appropriate notice to all parties.

7.13.3.~~(d)~~ ~~Motions and Objections at Hearing~~ - Motions made during a hearing and objections with respect to the conduct of a hearing, including objections to the introduction of evidence, shall be stated orally and shall, with the rulings of the Hearing Examiner, be included in the transcript of the hearing.

~~7.11~~ ~~Pre-Hearing Discovery~~

7.14~~(a)~~ Subsequent to the issuance and service of Notice of Public Hearing upon a respondent, the parties may employ the pre-hearing discovery measures set forth in Rule 7 of these Rules and Regulations in addition to oral interviews and informal requests for documents or other materials and information.

~~(b) Discovery shall commence upon notice of hearing and extend over such time as determined by the Hearing Examiner, not to exceed 180 days from the date of the filing of the complaint. This rule shall not prevent discovery if the case has been continued on motion by the parties beyond the 180 day statutory mandate for hearing as established by the Act.~~

7.14.1. Discovery shall commence upon notice of hearing and extend over such time as determined by the Hearing Examiner.

7.14.2.~~(c)~~ Scope of Discovery of the Commission's Records, Documents and Other Information Relating to a Complaint - The staff of the Commission will not be examined either by interrogatory or deposition except when leave to undertake such examination is granted by the Hearing Examiner upon motion alleging that:

7.14.2.a.~~(1)~~ The staff person has direct personal knowledge of evidence relevant to the proceeding other than evidence gathered as a result of investigation;

7.14.2.b.~~(2)~~ For other reasons which shall be set forth with particularity, justice requires that the petition be granted; or

7.14.2.c.~~(3)~~ Discovery has revealed that the staff person will be called as a witness.

7.14.3.~~(d)~~ ~~Exemptions from Discovery~~ - Information which is exempt from discovery includes but is not limited to the following:

7.14.3.a.~~(1)~~ Any record, report, memorandum, or communication dealing with the internal practice, policy and procedure of the Commission.

7.14.3.b.~~(2)~~ Any record, report, memorandum, or communication of staff or any staff meeting regarding the institution, progress or result of an investigation of a complaint or regarding matters prepared in anticipation of a hearing.

7.14.3.c.~~(3)~~ Any report, record, memorandum, or communication regarding any endeavor to eliminate the unlawful, discriminatory practice complained of by conference, conciliation or persuasion.

7.14.3.d.~~(4)~~ The work product of an investigator or other staff member made in the course of an investigation of a complaint or in anticipation of or in preparation for a hearing on the complaint, or any report, record, memorandum, or communication made by staff during the investigation of a complaint or in anticipation of or in preparation for a hearing on the complaint which is otherwise privileged.

7.14.3.e.~~(5)~~ Any memorandum, statement or mental impression prepared or obtained by a staff attorney.

7.14.3.f.~~(6)~~ The identity of confidential informants and sources, unless they are to be used as witnesses.

7.15. ~~Pretrial Procedure; Formulating Issues~~~~(a)~~ In any action, the Hearing Examiner may direct the attorneys for the parties and the Commission to appear before ~~it~~ him/her for a conference to consider, or by a prehearing memorandum require:

7.15.1.~~(1)~~ Stipulations of uncontested facts. Such stipulations shall be deemed to be proven facts for purposes of the hearing record.

7.15.2.~~(2)~~ The necessity or desirability of amendments to the pleadings.

7.15.3.~~(3)~~ A list of all exhibits each party is going to offer into evidence at trial, including any objections to be used by the opposing party or stipulations regarding admissibility or authenticity.

7.15.4.~~(4)~~ A list of all witnesses who shall be called by any party. If any such witness shall be called as an expert, the party to call such expert shall briefly describe the topic which the expert's testimony shall address.

7.15.5.~~(5)~~ Such other matters as may aid in the disposition of the action.

7.15.6.~~(6)~~ Should any party fail to comply with the pre-hearing memorandum requirement, the Hearing Examiner on motion or sua sponte, may file a recommendation of dismissal or default or other appropriate order imposing sanctions as justice may require~~.~~ ,including those delineated at Rule 7.17(b).

7.15.7.~~(b)~~ The Hearing Examiner shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by stipulations or agreements of counsel; and after the order has been examined by counsel and entered, it controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The Hearing Examiner may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided. Objections to the prehearing statement may be noted on the record for appeal purposes.

~~7.13 General Provisions Governing Discovery~~ -

7.16.~~(a)~~ Discovery methods. Parties may obtain discovery by one or more of the following methods:

7.16.1.~~(1)~~ Depositions may be obtained only by motion served upon the parties and by order of the Hearing Examiner;

7.16.2.~~(2)~~ Written interrogatories may be used but are limited to a total of 40 questions to be answered by any person, party, agent, witness or etc. to whom the interrogatories are propounded. This numerical limitation of questions applies whether or not the questions appear in sets, subsets, sections or etc.;

7.16.3.~~(3)~~ Request to produce documents or things or permission to enter upon land or other property, for inspection and other purposes. Unless the Hearing Examiner orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited; provided however, in those cases in which a party is proceeding Pro Se the party requesting the discovery shall file a written motion with the Hearing Examiner requesting leave to perfect the same. The Hearing Examiner shall review said motion and issue an order either denying the request or providing the conditions by which the discovery shall be conducted.

7.17.~~(b) Scope of discovery.~~ Unless otherwise limited by order of the Hearing Examiner in accordance with these rules, the scope of discovery is as follows:

7.17.1.~~(1)~~ In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

7.17.2~~(2) Hearing Preparation: Materials~~ - Subject to the provisions of ~~subdivision (b)(3)~~ subsection 7.17.3. of this rule, a party may obtain discovery of documents and tangible things otherwise not discoverable under subsection 7.17.1 ~~(b)(1)~~ of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Hearing Examiner shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

7.17.3.~~(3) Hearing Preparation: Experts.~~ - Discovery of facts known and opinions held by experts, otherwise discoverable under the provi

sions of ~~subdivision (b)(1)~~section 7.17.1. of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

7.17.3.a.~~(i)~~ A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

7.17.3.b.~~(ii)~~ Upon motion, the Hearing Examiner may order further discovery by other means, subject to such restrictions as the Hearing Examiner may deem appropriate.

7.18~~(e)~~ Protective orders. - Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Hearing Examiner may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

7.18.1.~~(1)~~ that the discovery not be had;

7.18.2.~~(2)~~ that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

7.18.3.~~(3)~~ that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

7.18.4.~~(4)~~ that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

7.18.5.~~(5)~~ that discovery be conducted with no one present except persons designated by the Hearing Examiner;

7.18.6.~~(6)~~ that a deposition after being sealed be opened only by order of the Hearing Examiner or Commission;

7.18.7.~~(7)~~ that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way;

7.18.8.~~(8)~~ that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Hearing Examiner.

7.18.9. If the motion for a protective order is denied in whole or in part, the Hearing Examiner may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule ~~7.17(a)(4)~~ 7.27.4. apply to the award of expenses incurred in relation to the motion.

7.19.~~(d) Sequence and timing of discovery.~~ - Unless the Hearing Examiner upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

7.20.~~(e) Supplementation of responses.~~ - A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

7.20.1.~~(1)~~ A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

7.20.2.~~(2)~~ A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

7.20.3.~~(3)~~ A duty to supplement responses may be imposed by order of the Hearing Examiner, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

~~7.14~~ **~~Matters Regarding Discovery Procedure~~** -

7.21.~~(a)~~ The parties may by written stipulation filed with the Hearing Examiner:

7.21.1.~~(1)~~ provide that depositions may be taken before any persons, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

7.21.2.~~(2)~~ modify the procedures provided by these rules for other methods of discovery.

7.22.~~(b)~~ Depositions of any person may be requested upon motion by any party and the Hearing Examiner by order may establish the circumstances under which the depositions are to be taken. This rule does not prevent the Hearing Examiner from refusing to allow the taking of any deposition or in any way limit the Hearing Examiner's discretion as provided in these rules.

7.23.~~(c)~~ Physical and Mental Examinations for Discovery Purposes will be allowed only for good cause upon motion to the Hearing Examiner and only when medical testimony is to be substantially relied upon in the action. In those circumstances the Hearing Examiner may order the examination of any person, the cost of which including reasonable travel expenses, loss of wages, etc., shall be borne by the requesting party. Under certain circum

stances the requesting party may also be required to pay the expenses of a necessary travelling companion and the examined parties' attorney and/or physician.

7.24.~~(d)~~ The Hearing Examiner shall take notice of the Commission's ~~Interpretive~~ Rules Governing Discrimination ~~on~~ Against the Handicapped.

~~7.15~~ ~~Interrogatories to Parties~~ -

7.25.~~(a)~~ ~~Availability; Procedures for Use.~~ - Subject to the limitations and proviso of Rule ~~7.13(a)(2),~~ ~~(3)~~7.16.2. any party or the Commission may serve upon any other party, their attorney or agent, written interrogatories to be answered by the party designated or, if the party designated is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

7.25.1. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within ~~15~~ 20 days after the service of the interrogatories. Upon Motion, the Hearing Examiner may allow a shorter or longer time or expand the number of questions limited by Rule ~~7.13(a)(2)~~7.16.2.. The party submitting the interrogatories may move for an order under Rule ~~7.17(a)~~7.27. with respect to any objection to or other failure to answer an interrogatory.

7.25.2.~~(b) Scope; Use at Public Hearing.~~ - Interrogatories may relate to any matters which can be inquired into under Rule ~~7.13(b)~~7.17., and the answers may be used to the extent permitted by the rules of evidence as set forth in Rule ~~7.19~~7.30.

7.25.3. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Hearing Examiner may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

~~7.16~~ ~~Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes~~ -

7.26.~~(a) Scope.~~ - Any party subject to the proviso of Rule ~~7.13(a)~~7.16. may serve on any other party a request ~~(1)~~7.26.1. to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, draw-

ings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the responding party through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule ~~7.13(b)~~7.17. and which are in the possession, custody or control of the party upon whom the request is served; or ~~(2)~~7.26.2. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of ~~7.13(b).~~7.17.

7.26.3.~~(b)~~ Procedure. - The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

7.26.4. The party upon whom the request is served shall serve a written response within ~~15~~ 20 days after the service of the request. The Hearing Examiner may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 7.17(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

7.26.5.~~(c)~~ Persons Not Parties. - This rule does not preclude an independent request directed to a person not a party for production of documents and things and permission to enter upon land.

~~7.17~~ ~~Failure to Make Discovery; Sanctions~~ -

7.27.~~(a)~~ ~~Motion for Order Compelling Discovery.~~ - A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

7.27.1.~~(1)~~ A motion for an order to compel discovery shall be made to the Hearing Examiner. The Hearing Examiner may set the motion for hearing or rule upon the motion without a hearing.

7.27.2.~~(2)~~ If a party fails to answer an interrogatory submitted under Rule ~~7.15~~7.25., or if a party, in response to a request for inspection submitted under Rule ~~7.16~~7.26. fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order as set forth in ~~Rule 7.17(a)(1).~~ this rule.

If the Hearing Examiner denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule ~~7.13(e)~~ 7.18.

7.27.3.~~(3) Evasive or Incomplete Answer.~~ - For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

7.27.4.~~(4) Award of Expenses of Motion.~~ - If the motion is granted the Hearing Examiner may after opportunity for hearing, ~~recommend to the Commission in the recommended order~~ require as part of his or her final decision that the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the Hearing Examiner finds that the opposition to the motion was reasonably justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the Hearing Examiner may, after opportunity for hearing, ~~recommend to the Commission in the recommended order~~ require as part of his or her final order that the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the Hearing examiner finds that the making of the motion was reasonable or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the Hearing Examiner may recommend apportioning the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

~~(b) Failure to Comply With Orders or These Rules -~~

7.27.5.~~(1) Sanctions by the Hearing Examiner.~~ - If a party or an officer, director, or managing agent of a party or a person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule, or under Rule 12.7(b) the Hearing Examiner may make such orders in regard to the failure as are just, and among others the following:

7.27.5.a.~~(2)~~ An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

7.27.5.b.~~(3)~~ An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

7.27.5.c.~~(4)~~ An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

7.27.5.d.~~(5)~~ In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of the Commission the failure to obey any orders.

7.27.5.e.~~(6)~~ In lieu of any of the foregoing orders or in addition thereto, the Hearing Examiner may ~~recommend to the Commission in the recommended order~~ require as part of his or her final decision that the party and/or attorney failing to obey these rules ~~or an order or both~~ pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Hearing Examiner finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

7.28.~~(e)~~ Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. - If a party or an officer, director, or managing agent of a party or a person designated to testify on behalf of a party fails:

7.28.1.~~(1)~~ to appear before the officer who is to take his deposition, after being served with a proper notice, and order, or

7.28.2.~~(2)~~ to serve answers or objections to interrogatories submitted under Rule 7.25 after proper service of the interrogatories, or

7.28.3.~~(3)~~ to serve a written response to a request for inspection submitted under Rule 7.26., after proper service of the request, the Hearing Examiner on motion may make such orders in regard to the failure as are just, and among others he may take an action authorized subdivision ~~(b)~~7.27.3. by this section. In lieu of any order or in addition thereto, the Hearing Examiner ~~may recommend to the Commission in the recommended order~~ may require as part of his/her final decision that the party failing to act or the attorney advising him or both pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Hearing Examiner finds that the failure was reasonable or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule ~~7.13(e)~~7.18..

~~7.18~~ **~~Relief From Judgment or Order~~** -

~~Clerical mistakes.~~ - Upon notice to the parties and the Commission clerical mistakes and inadvertence in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Hearing Examiner or Human Rights Commission at any time of its own initiative or on the motion of any party and after such notice, if any, as

the Hearing Examiner or Human Rights Commission orders. During the pendency of an appeal, ~~pursuant to Chap. 29A-5-4,~~ such mistakes may be so corrected before the appeal is docketed in the court, and thereafter while the appeal is pending may be so corrected with leave of the court.

~~7.19~~ ~~Rules of Evidence~~ -

7.30. Pursuant to WV Code Chap. 5-11-10 the provisions of Chap. 29A-5-2 shall be applied except where contrary to the Act or these rules.

7.31.~~7.20~~ ~~Depositions~~ - Evidentiary depositions may be taken upon a motion and order as provided in Rule ~~7.14~~7.21. The extent of their use shall be determined by the Hearing Examiner.

7.32.~~7.21~~ ~~Issues Not in the Pleadings~~ - When issues not raised in the complaint, as amended, or answer, as amended, are heard by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after final order; but failure to so amend shall not affect the adjudication of the hearing of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the Hearing Examiner may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to show that admission of such evidence would prejudice him in maintaining his defense on the merits. The Hearing Examiner may grant a continuance to enable the objecting party to meet such evidence.

~~7.22~~ ~~Oral Argument, Briefs and Findings~~ -

~~(a) The Hearing Examiner may permit the parties or their attorneys to present oral arguments at the hearing and may require briefs to be filed within such time limit as the Hearing Examiner shall determine. Oral argument shall not be included in the transcript of testimony unless the Hearing Examiner so directs.~~

~~(b) At the close of the hearing the Hearing Examiner may order or may permit the parties to submit a suggested decision to the Commission and the Hearing Examiner within 30 days of the conclusion of the hearing. A suggested decision shall include suggested findings of fact, conclusions of law and arguments in support thereof, along with the final order by the Commission which the party desires.~~

~~(c) The Hearing Examiner shall submit a proposed order and decision accompanied by findings of fact and conclusions of law to the Commission and to all parties to the hearing within sixty (60) days of the conclusion of the hearing or timely receipt of the party's proposed finding, whichever shall last occur. The parties affected shall be given fifteen (15) days within which to file, in written form only, exceptions to~~

said proposals and findings and present, in written form only, argument in support of said exceptions to the Commission. In the event that the Hearing Examiner shall fail to submit such decision and findings, the Commission shall within one (1) year of the filing of the complaint enter its own findings and decision based upon the record of all testimony, exhibits, briefs and arguments submitted by the parties in connection with the hearing, pursuant to Rule 9 below. In the event that the Hearing Examiner's proposed order, accompanied by findings of fact and conclusions of law, is untimely, the Commission may consider such proposed order but shall in any event enter a final order within one year of the date of the filing of the complaint.

(d) During the time period specified by the Hearing Examiner for submission of the parties' suggested decision as set forth in (b) above, the parties shall be permitted to file by affidavit an itemized statement of reasonable attorney fees and costs, clearly setting forth the hourly rate and total amount. At the time of filing exceptions as set forth in (c) above, a party may file exceptions to the attorney(s) fee affidavit filed by any other party or as recommended by the Hearing Examiner.

7.33 Improper Conduct - The Hearing Examiner may exclude from the hearing room or from further participation in the proceeding any person who engages in improper conduct before him, including a party to the proceeding, his attorney of record, or a witness engaged in testifying.

7.34. Television, newsreel, motion picture, still or other cameras may be operated in the hearing room while the public hearing is in progress only with the permission of the Hearing Examiner. No lights or other devices may be used in connection with such cameras. Mechanical recording devices other than those provided by the Commission or at its direction may be operated in the hearing room during the course of the hearing only with the permission of the Hearing Examiner.

7.23 Improper Conduct -

(a) The Hearing Examiner may exclude from the hearing room or from further participation in the proceeding any person who engages in improper conduct before him, including a party to the proceeding, his attorney of record, or a witness engaged in testifying.

(b) Television, newsreel, motion picture, still or other cameras may be operated in the hearing room while the public hearing is in progress only with the permission of the Hearing Examiner. No lights or other devices may be used in connection with such cameras. Mechanical recording devices other than those provided by the Commission or at its direction may be operated in the hearing room during the course of the hearing only with the permission of the Hearing Examiner.

7.35. The Commission shall cause the hearing to be recorded by a reporter or by an electronic recording device. If an electronic recording

device is utilized, the parties shall be given the opportunity to provide their own reporter at the hearing at their own expense. The Commission's copy of the transcript of testimony, if one is made, shall be available to all parties for examination at all reasonable times without cost.

If any parties wish a copy of the transcript for their own personal use, such copy or copies may be purchased from the court reporter or other person responsible for preparing the transcript or the Commission when appropriate.

~~7.24 Transcript of Testimony - The Commission shall cause the hearing to be recorded by a reporter or by an electronic recording device. If an electronic recording device is utilized, the parties shall be given the opportunity to provide their own reporter at the hearing at their own expense. The Commission's copy of the transcript of testimony shall be available to all parties for examination at all reasonable times without cost.~~

~~If any parties wish a copy of the transcript for their own personal use, such copy or copies may be purchased from the court reporter or other person responsible for preparing transcript or the Commission when appropriate.~~

7.36. Reopening Hearings - At any time after a hearing has closed, but prior to rendering a decision, the Hearing Examiner upon his/her own motion or upon motion by any party, may reopen the hearing for good cause. Thereafter, the Chairperson may on his/her own motion, or upon motion by any party, reopen the proceeding for good cause to receive further evidence or argument. Should either the Hearing Examiner or Chairperson reopen the hearing, notice shall promptly be given to all the parties as to the time and place further proceedings will occur.

~~7.25 Reopening Hearings - At any time after a hearing has closed, but prior to the recommended decision, the Hearing Examiner upon his own motion or upon motion by any party, may reopen the hearing for good cause. Thereafter, the Chairperson may on his own motion, or upon motion by any party, reopen the proceeding for good cause to receive further evidence or argument. Should either the Hearing Examiner or Chairperson reopen the hearing, notice shall promptly be given to all the parties as to the time and place further proceedings will occur.~~

7.37. The Hearing Examiner may permit the parties or their attorneys to present oral arguments at the hearing and may require briefs to be filed within such time limit as the Hearing Examiner shall determine. Oral argument shall not be included in the transcript of testimony unless the Hearing Examiner so directs.

7.37.1. At the close of the hearing the Hearing Examiner may order or may permit the parties to submit a recommended decision to the Hearing Examiner within 30 days of the conclusion of the hearing. A recommended decision shall include suggested findings of fact, conclusions of law and arguments in support thereof, along with the final decision by the Hearing Examiner which the party desires.

7.37.2. During the time period specified by the Hearing Examiner for submission of the parties' recommended decision as set forth in (b) above, the parties shall be permitted to file by affidavit an itemized statement of reasonable attorney fees and costs, clearly setting forth the hourly rate and total amount. A party affected shall be given 15 days during which to file exceptions to the attorney(s) fee affidavit filed by any other party or as recommended by the Hearing Examiner.

~~RULE 8.~~ 77-2-8. THE RECORD

8.1. ~~The Record~~ - The record of the proceedings before the Commission shall consist of the complaint and amended complaint, if any, answer, notices of hearing, written applications, stipulations, motions, orders, transcript or recording of the record on the hearing, exhibits, depositions, ~~the final order, and along with the final order any modifications thereof,~~ briefs, the recommended decision, the final order of the hearing examiner, and the final order of the Commission.

~~RULE 9. FINAL ORDERS~~
77-2-9. FINAL ORDERS

~~9.1 Contents of Order - An order of the Commission issued after hearing shall set forth the Commission's findings of fact, conclusions of law, its decision and, in its discretion, an opinion containing the reasons for said decision. It shall also contain notice that a motion for reconsideration may be filed in accordance with Rule 9.6(a) on the issues.~~

9.1 Within one year of the filing of the complaint, the hearing examiner shall issue a final decision on the merits which shall contain all findings of fact and conclusions of law necessary to support the decision, and in the Hearing Examiner's discretion an opinion containing the reasons for the decision.

9.2. ~~Issuance of Order -(a)~~ If upon all the testimony, evidence and record of the hearing the ~~Commission~~ Hearing Examiner shall find that the respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in the Act, the ~~Commission~~ Hearing Examiner shall issue an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, ~~as in the judgment of the Commission,~~ which will effectuate the purpose of the Act, which shall include a requirement for report from time to time of the manner and extent of compliance and which shall include an award reimbursing complainant for out-of-pocket losses.

9.3.~~(b)~~ In addition to the remedies outlined in 9.2.~~(a)~~ above, the ~~Commission~~ Hearing Examiner may:

~~(1)~~ Assess ~~against a respondent an award of damages to the victim or victims of the discrimination,~~ for whatever amounts may be shown to have resulted from such discrimination, ~~including attorneys' fees. Evidence to show such monetary amounts may be in the form of documentary evidence or testimony.~~

9.3.1.~~(2)~~ Assess against a respondent an award of backpay to the victim or victims of discrimination pursuant to WV Code 5-11-10. For cases involving discriminatory acts which occurred after the effective date of the Human Rights Act, July 1, 1967, the period for which backpay may be awarded shall commence with the date of the discriminatory act and end when such backpay is actually tendered by the respondent. For cases involving discriminatory acts which occurred before the effective date of the West Virginia Human Rights Act, the effects of such discriminatory acts continuing to a time after the effective date of the Human Rights Act, the period for which backpay may be awarded may commence with the effective date of the Human Rights Act, July 1, 1967, and end when such backpay is actually tendered by the respondent. Interest may also be included in such award of backpay as the ~~Commission~~ Hearing Examiner may determine.

9.3.2. Assess against a respondent an award of incidental damages up to $2,500.00.

9.3.3. Assess against a respondent an award of complainant's attorney fees and costs.

9.4.~~(c)~~ If upon all the testimony, evidence and record of the hearing the ~~Commission~~ Hearing Examiner shall find that the respondent has not engaged in any unlawful discriminatory practice as defined in the Act, the ~~Commission~~ Hearing Examiner shall issue an order dismissing the complaint as to such respondent.

~~9.3 Preparation in Drafting of Final Order - The Commission may utilize the services of an attorney in preparing and drafting its final order.~~

9.5. Service of Order - Copies of orders shall be personally delivered or sent by certified mail, return receipt requested, or by such other means as are reasonably calculated to give actual notice to the complainant, respondent, attorney general, interveners and to such other public officers as the Hearing Examiner may deem proper. Such order shall be accompanied by a notice of the statutory right to appeal such final order to the Commission within 30 days of receipt of the Hearing Examiner's decision.

~~9.4 Service of Order - Copies of orders shall be personally delivered or sent by certified mail, return receipt requested, or by such other means as are reasonably calculated to give actual notice to the complainant, respondent, attorney general, interveners and to such other public officers~~

as the Commission may deem proper. Such order shall be accompanied by a notice of the statutory right to judicial review.

9.6. Filing of Order - All final orders rendered by the Commission shall be filed at the central office of the Commission and shall be open to public inspection during regular office hours of the Commission.

9.5 Filing of Order - All final orders rendered by the Commission shall be filed at the central office of the Commission and shall be open to public inspection during regular office hours of the Commission.

9.6 Reconsideration of Final Order -

(a) Motion - Within ten (10) days after being served with the final order of the Commission after a public hearing, any party may serve and file a motion for reconsideration by the Commission. The motion shall identify the matters the party desires to have reconsidered and shall fully state the reasons for reconsideration and shall be served on all the parties.

(b) Finality for Judicial Review - When a motion for reconsideration has been filed, the order of the Commission shall not be deemed final for purposes of appeal until the Commission has served its ruling on the motion.

(c) Reconsideration Not Necessary for Appeal - It shall not be necessary to file a motion for reconsideration in order to seek judicial review.

RULE 10. GENERAL INVESTIGATIONS

10.1 General Investigations -

(a) The Commission may, at its discretion, conduct such general investigations and hearings into the problems of discrimination as it deems necessary or desirable and may study and report upon the problems of the effect of discrimination on any field of human relationships.

(b) In pursuing its functions authorized by the Act and by this section, the Commission may exercise its full powers of discovery as set forth in the Act and in these regulations.

RULE 10.77-2-10. APPEAL TO THE FULL COMMISSION

10.1 Appeal From Decision of the Hearing Examiner.

10.1.Within 30 days of receipt of the Hearing Examiner's final decision, any party aggrieved shall file with the Executive Director/Chairperson of the Commission and serve upon all the parties a

petition setting forth facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided and the relief to which the appellant believes he/she is entitled.

~~10.02 Stay of Order~~

10.2. The filing of an appeal from the decision of the Hearing Examiner shall not operate as a stay of the order of the Hearing Examiner unless specifically ordered by the commission.

10.3. Record of Appeal

Appeal petitions shall be confined to the record.

~~7-2-11. DECLARATORY RULINGS - GUIDELINES~~

~~11.1~~ Declaratory Rulings by Commission - Procedure

~~(a)~~ Petitions - Petitions for declaratory rulings pursuant to WV Code ~~29A-4-1~~ shall be filed with the Commission and contain the following:

~~(1)~~ A statement of the question on which the declaratory ruling is sought;

~~(2)~~ A full statement of the facts giving rise to the question;

~~(3)~~ A statement of the basis for the petitioner's interest in the question.

~~(b)~~ Confirmation Investigation - In order to determine the full facts giving rise to the question the Commission may require the petitioner to submit additional information, and it may make an independent investigation.

~~(c)~~ Consideration and Disposition - When the Commission is satisfied that it understands the question on which the declaratory ruling has been sought, it shall:

~~(1)~~ Issue a nonbinding declaratory ruling; or

~~(2)~~ Notify the petitioner that no declaratory ruling will be issued; or

~~(3)~~ Set a time and place for hearing argument on the question, notify the petitioner of them, and issue either a binding or nonbinding declaratory ruling after the hearing.

~~11.2~~ Guidelines - In order to educate the public and insure compliance

~~with the Human Rights Act, the Commission may from time to time promulgate guidelines for various areas of employment, housing, and public accommodations as are covered by the West Virginia Human Rights Act. Such guidelines shall be administered by the Commission staff and shall become a part of these rules and regulations by reference when adopted by the Commission. All guidelines in existence at the time of the adoption of these rules and regulations shall also be incorporated by reference. All guidelines so promulgated by the Commission shall be contained in an appendix to the rules and regulations.~~

RULE ~~1~~77-2-11. COMMISSION DECISION (Final Order of the Commission)

11.1. After appeal from the decision of the Hearing Examiner, the commission may affirm the decision, or remand the matter for further proceedings before the hearing examiner; or set aside or modify the decision, if it determines that the substantial rights of any party may have been prejudiced because the decision is:

11.1.1.~~(a)~~ in violation of constitutional provisions; or

11.1.2.~~(b)~~ in excess of the statutory authority or jurisdiction of the commission; or

11.1.3.~~(c)~~ based on an error of law; or

11.1.4.~~(d)~~ made on unlawful procedure; or

11.1.5.~~(e)~~ unsupported by substantial evidence; or

11.1.6.~~(f)~~ arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

~~77-2-12. CERTIFICATION~~

~~12.1 Certification of Documents and Records - The Chairperson, Executive Director or such other person as may be designated or authorized by the Commission are authorized to certify all documents or records which are part of the files and records of the Commission.~~

RULE ~~1~~77-2-12. JUDICIAL APPEAL

~~12.01 Who May Obtain Judicial Review of a Final Commission Order~~

12.1.~~(a)~~ Judicial review of a final order of the Commission may be obtained by the complainant, respondent or other person aggrieved by such order.

~~12.02 Appeal Period~~

12.2. A party who seeks judicial review of a final order must file his appeal within thirty (30) days of a final order of the Commission.

~~12.03 Definition of Final Commission Order~~

12.3. For purpose of judicial appeal, the decision of the commission on appeal from the decision of the hearing examiner shall constitute the final order of the commission.

~~77-2-13. PUBLIC INFORMATION~~

~~13.1~~ Definition - ~~The following documents shall be available for inspection upon request. Duplication of materials available for inspection shall be subject to whatever charges the Commission may require for copying. Upon a showing of economic hardship, the Commission may waive or reduce normal fees for the copying of documents within its control or possession:~~

~~(a)~~ Complaint

~~(b)~~ Answer

~~(c)~~ Consent Order

~~(d)~~ Determinations and final dispositions of the Commission, any pleadings, briefs, subpoenaes, answers, motions, and responses, orders filed or issued.

~~(e)~~ Notice of public hearing.

~~(f)~~ Transcript, exhibits and other evidence of record or of the hearing.

~~(g)~~ Decisions issued by the Commission after public hearing.

~~(h)~~ Notice of appeal from decision issued by the Commission.

~~13.2~~ Information Not Public - The following materials shall not constitute public information:

~~(a)~~ Interrogatories and answers of Respondent.

~~(b)~~ Those materials set forth in Rule ~~7.11(d)~~.

~~13.3~~ Specific Exceptions to Rule ~~13.2~~ - Notwithstanding the provisions of Rule ~~13.2~~ materials cited therein may be made available by order of the Executive Director or Hearing Examiner as provided below:

~~(a) To counsel retained by the Commission or by Complainant (where such counsel has been designated as counsel for the complaint) for the purpose of conciliation, enforcement of a consent order or pre-determination settlement, presentation of the case at public hearing;~~

~~(b) To the complainant or to counsel retained by the Complainant for the purpose of determining whether the case shall be removed to another forum pursuant to~~ WV Code ~~5-11-13;~~

~~(c) To local, state or federal agencies having concurrent jurisdiction over the case;~~

~~(d) In response to an order and any court having competent jurisdiction.~~

RULE ~~1377~~-2-13. JUDICIAL ENFORCEMENT

13.1. Where no party files a timely appeal to the full commission of a final decision of a Hearing Examiner, that decision shall constitute the final order of the commission for purposes of judicial enforcement. If an appeal to the full commission is timely filed, the decision of the full commission shall constitute the final order of the commission for purposes of judicial enforcement.

RULE ~~1477~~-2-14. GENERAL INVESTIGATIONS

~~14.01 General Investigations -~~

14.1. The Commission may, at its discretion, conduct such general investigations and hearings into the problems of discrimination as it deems necessary or desirable and may study and report upon the problems of the effect of discrimination on any field of human relationships.

14.2. In pursuing its functions authorized by the Act and by this section, the Commission may exercise its full powers of discovery as set forth in the Act and in these regulations.

RULE ~~1577~~-2-15. DECLARATORY RULINGS AND GUIDELINES

~~15.1 Declaratory Rulings by Commission - Procedure~~

15.1. Petitions for declaratory rulings pursuant to WV Code 29A-4-1 shall be filed with the Commission and contain the following:

15.1.1. A statement of the question on which the declaratory ruling is sought;

15.1.2. A full statement of the facts giving rise to the question;

15.1.3. A statement of the basis for the petitioner's interest in the question.

15.2. In order to determine the full facts giving rise to the question the Commission may require the petitioner to submit additional information, and it may make an independent investigation.

15.3. Consideration and Disposition - When the Commission is satisfied that it understands the question on which the declaratory ruling has been sought, it shall:

15.3.1. Issue a nonbinding declaratory ruling; or

15.3.2. Notify the petitioner that no declaratory ruling will be issued; or

15.3.3. Set a time and place for hearing argument on the question, notify the petitioner of them, and issue either a binding or non-binding declaratory ruling after the hearing.

15.4. In order to educate the public and insure compliance with the Human Rights Act, the Commission may from time to time promulgate guidelines for various areas of employment, housing, and public accommodations as are covered by the West Virginia Human Rights Act. Such guidelines shall be administered by the Commission staff and shall become a part of these rules and regulations by reference when adopted by the Commission. All guidelines in existence at the time of the adoption of these rules and regulations shall also be incorporated by reference. All guidelines so promulgated by the Commission shall be contained in an appendix to the rules and regulations.

RULE ~~1~~677-2-16. CERTIFICATION

16.1. Certification of Documents and Records - The Chairperson, Executive Director or such other person as may be designated or authorized by the Commission are authorized to certify all documents or records which are part of the files and records of the Commission.

RULE ~~1~~777-2-17. PUBLIC INFORMATION

17.1. The following documents shall be available for inspection upon request. Duplication of materials available for inspection

shall be subject to whatever charges the Commission may require for copying. Upon a showing of economic hardship, the Commission may waive or reduce normal fees for the copying of documents within its control or possession:

17.1.1. Complaint

17.1.2. Answer

17.1.3. Consent Order

17.1.4. Determinations and final dispositions of the Commission, any pleadings, briefs, subpoenaes, answers, motions, and responses, orders filed or issued.

17.1.5. Notice of public hearing.

17.1.6. Transcript, exhibits and other evidence of record or of the hearing.

17.1.7. Decisions issued by the Commission after public hearing.

17.1.8. Notice of appeal from decision issued by the Commission.

17.2. The following materials shall not constitute public information:

17.2.1. Interrogatories and answers of Respondent.

17.2.2. Those materials set forth in Rule 7.11(d).

17.3. Notwithstanding the provisions of Rule 13.2 materials cited therein may be made available by order of the Executive Director or Hearing Examiner as provided below:

17.3.1. To counsel retained by the Commission or by Complainant (where such counsel has been designated as counsel for the complaint) for the purpose of conciliation, enforcement of a consent order or pre-determination settlement, presentation of the case at public hearing;

17.3.2. To the complainant or to counsel retained by the Complainant for the purpose of determining whether the case shall be removed to another forum pursuant to WV Code 5-11-13;

17.3.3. To local, state or federal agencies having concurrent jurisdiction over the case;

17.3.4. In response to an order and any court having competent jurisdiction.