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WEST VIRGINIA

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR
Governor

TELEPHONE 304-348-2616

NOTICE OF PUBLIC HEARING

Pursuant to Section 5, Article 3, Chapter 29A of the Code of West Virginia, 1931, as amended, the West Virginia Human Rights Commission shall convene a public hearing at 1:00 p.m. on Thursday, May 9, 1985, in the large conference room of the Commission at the address given above for the purpose of taking evidence pertaining to the filing of Proposed Procedural Rules Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission.

Any citizen or other interested party may appear in person to present evidence. Any citizen or other interested party may submit written evidence at the public hearing or mail such written evidence to the address given above. All comments, written or oral, will be made a part of the public hearing record. The Commission requests that parties wishing to comment make an effort to submit written copies of their comments in order to facilitate review of the comments.

The issues to be heard shall be limited to the proposed rule. Copies of the proposed rule may be obtained from the Office of the Secretary of State.

Howard D. Kenney

HOWARD D. KENNEY
EXECUTIVE DIRECTOR

ENTERED: MARCH 25, 1985

HDK/elm

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
Deputy Secretary of State

RICHARD S. STEPHENSON
Deputy Secretary of State

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STATE OF WEST VIRGINIA
SECRETARY OF STATE
Charleston 25305

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Director, Administrative Law

DONALD R. WILKES
Director, Corporations

VIRGINIA SKEEN
Special Assistant

(Plus all the volunteer help we can get)

PROPOSED RULES

STATE REGISTER FILING

==========

AGENCY West Virginia Human Rights Commission

CONTACT PERSON Howard D. Kenney PHONE 348-2616

TYPE OF RULE Emergency Procedural Rules

TITLE OF RULE Rules and Regulations Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission.

CHAPTER 5 ARTICLE 11 SERIES IV

AUTHORITY WV Code 5-11-8 and WV Code 29A Sec. 3

++++++++++

CHECK APPLICABLE ITEMS BELOW TO SHOW KIND OF ACTION BEING TAKEN

☒ NEW RULE

☐ AMENDMENTS TO EXISTING RULE

☐ REPEAL OF EXISTING RULE

NOTE: ALL FILINGS REQUIRE ONLY ONE COPY, EXCEPT FINAL FILING OF RULES WHICH REQUIRES AN ORIGINAL AND A COPY.

☒ NOTICE OF HEARING

☐ NOTICE OF AGENCY APPROVAL (legislative rules only)

☐ NOTICE OF AGENCY ADOPTION (interpretive & procedural rules only)

☐ FINAL FILING

☐ FIRST EMERGENCY FILING

☐ SECOND EMERGENCY FILING

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

JOHN D. ROCKEFELLER IV
Governor

TELEPHONE: 304-348-2616

HOWARD D. KENNEY
Executive Director

NOTICE OF PUBLIC HEARING

Pursuant to Section 5, Article 3, Chapter 29A of the Code of West Virginia, 1931, as amended, the West Virginia Human Rights Commission shall convene a public hearing at 1:00 p.m. on December 12, 1984, in the large conference room of the Commission at the address given above for the purpose of taking evidence pertaining to the filing of proposed Proposed Procedural Rules Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission.

Any citizen or other interested party may appear in person to present evidence. Any citizen or other interested party may submit written evidence at the public hearing or mail such written evidence to the address given above. All comments, written or oral, will be made a part of the public hearing record. The Commission requests that parties wishing to comment make an effort to submit written copies of their comments in order to facilitate review of the comments.

The issues to be heard shall be limited to the proposed rule. Copies of the proposed rule may be obtained by telephoning 304-348-2616 or writing to the Commission at the address given above.

Howard D. Kenney

HOWARD D. KENNEY
EXECUTIVE DIRECTOR

ENTERED: NOVEMBER 9, 1984

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SECRETARY OF STATE

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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A MOORE JR
Governor

TELEPHONE 304-348-2616

August 7, 1985

Honorable Ken Hechler
Secretary of State
State Capitol Bldg.
Charleston, WV 25305

NOTICE OF COMMISSION'S ADOPTION OF

RULES OF PRACTICE AND PROCEDURE

Rule Title: Rules of Practice and Procedure Before the West Virginia Human Rights Commission

Rule Type: Procedural

The attached Rules constitute the official rules adopted by the West Virginia Human Rights Commission on July 18, 1985, and filed with the Secretary of State.

Howard D. Kenney
Executive Director

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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SECRETARY OF STATE

Rule Title: Rules of Practice and Procedure Before the West Virginia Human Rights Commission

Type of Rule: ____ Legislative ____ Interpretive __x__ Procedural

Agency West Virginia Human Rights Commission Address 215 Professional Bldg.
1036 Quarrier St.
Charleston, WV 25301

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

2. Explanation of above estimates.

No Financial Impact

3. Objectives of these rules:

Establish Rules of Practice and Procedure

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 August 7, 1985

Signature of Agency Head or Authorized Representative

Howard D. Kenney

HOWARD D. KENNEY
EXECUTIVE DIRECTOR
WEST VIRGINIA
HUMAN RIGHTS COMMISSION

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WV Code Chap. 5-11
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Rule 1. GENERAL

1.01 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.

1.02 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 legal counsel at any stage of proceedings before the Commission. 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.

1.03 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.

1.04 Filing Date - These regulations were promulgated on the 18th day of July, 1985 and filed on the 7th of August, 1985 in the Secretary of State's Office.

1.05 Effective Date - These regulations become effective on the 6th day of September, 1985, and shall apply to all complaints now pending and those hereafter filed.

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

1.07 Liberal Construction - These regulatons 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.

1.08 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.

1.09 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.

Rule 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.

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

2.02 The term "Answer" means that response required in Rule 6.01.

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

2.04 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.

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

2.06 The term "Commission's Attorney" shall mean an attorney who renders legal services to the Commission.

2.07 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 3.04.

2.08 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.

2.09 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, 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.

2.12 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.

2.13 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.

2.14 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.

2.15 The term "reply" means that response required in Rule 4.02.

2.16 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.

2.17 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.

Rule 3. COMPLAINTS

3.01 Who May File -

(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.

(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.

(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.

(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.

(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.

3.02 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.

3.03 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.

3.04 Contents

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

(1) The name and address of the complainant.

(2) The name and address of the respondent.

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

(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.

(5) The notarized signature of the complainant.

3.05 Manner of Filing

(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:

(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.

(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.

(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) Memorandum of Complaint - Where the Commission is informed by an individual, who is claiming to be aggrieved and who has given sufficient information, prior to the expiration of the ninety (90) day 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.

(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.

3.06 Amendments

(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, 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.

(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.

3.07 Reserved

3.08 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 4.02(a).

3.09 Withdrawal of Complaint -

(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.

(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 -

(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 4.08(d).

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

(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.

(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:

(i) Verification from the WV Department of Motor Vehicles of the party's last known address;

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

(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.

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

(5) Mootness of the allegations of the complaint.

(c) 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 4.08.

3.11 Docketing of Complaint - Docketing of all complaints with the Commission shall be completed promptly.

3.12 Preservation of Records

(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 complaint 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.

(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 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.

(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.

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

Rule 4. INVESTIGATION AND CONCILIATION

4.01 Timely Investigation -

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.

4.02 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 6.01.

(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.

(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.

(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.

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 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.

4.03 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.

4.04 Finding of No Probable Cause -

(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 4.08. Such ruling shall be a final decision of the Commission unless a review is taken as provided in Rule 4.08.

(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 4.08), the Commission shall be substituted in the complainant's place, and the complaint shall go forward in the name of the Commission as provided in Rule 4.05 below.

4.05 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.

4.06 Confidentiality of Conciliation Endeavors -

(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, 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.

(b) This 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.

(c) The requirements of this 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.

4.07 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 or may take any action consistent with the Act which it deems appropriate.

4.08 Request for Review -

(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.

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.

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.

(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.

(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) Procedures for Review -

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

(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. Testimony taken at such review hearing will not be transcribed or under oath. The complainant shall have the burden of showing that the dismissal of the complaint is arbitrary, capricious, or not in accordance with law. Commission's Attorney will hear the evidence, recommend a further investigation, and file a report and recommendation with the Chairperson or Executive Director.

(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 4.05 and Rule 5.01 of these rules.

(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.

(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.

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.

Rule 5. NOTICE OF HEARING

5.01 Issuance and Service of Notice of Public Hearing -

(a) 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.

(b) 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.

5.02 Contents of Notice of Public Hearing -

(a) 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.

(b) 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.

(c) The notice of hearing shall contain a statement that the public hearing will be conducted by a hearing panel whose names will be designated or will be subsequently designated by the Commission's Chairperson or Executive Director.

5.03 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.

(a) 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.

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

(1) All such Motions for continuance shall be in writing and must be supported by affidavit of the party or the party's attorney showing good cause why the request should be granted.

(2) 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.

(c) Oral motions for continuance will only be allowed when the other party, the agent for the other party, or the other party's attorney have been notified, and when the Hearing Examiner is satisfied that (a) there is no time for a written motion (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.

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

(e) 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.

5.04 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. ANSWER

6.01 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)

6.02 Manner of Filing - The filing shall be by personal delivery or by certified mail, return receipt requested to the Hearing Examiner.

6.03 Form of Answer -

(a) The answer shall be in writing, the original being signed and verified by the respondent or respondent's attorney. The answer

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(1)This answer is an additional requirement from the reply required in Rule 4.02.

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.

(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.

(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.

(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.

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

6.05 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.

6.06 Failure to File Answer or Appear - The hearing panel 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 finding of fact and enter its order upon the testimony taken at the hearing.

Rule 7. HEARINGS

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

7.02 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 agree able place. The place of the hearing will be designated by the Hearing Examiner.

7.03 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.

7.04 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.

(b) The qualifications of the hearing panel 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 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.

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

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

7.05 Reserved

7.06 Appearances -

(a) Complainant -

(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.

(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.

(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.

(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, the case in support of the complaint may be presented solely by the complainant's attorney.

(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.

7.07 Representation by an Attorney -

(a) Appearance - If any party designates an attorney-at-law to represent him before the Commission, such attorney shall file a notice of appearance with the Commission. 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:

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

(2) The attorney files with the Commission 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

(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.

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

7.09 Subpoenaes

(a) Issuance - Subject to the pertinent provisions of the Act,
Commission may issue subpoenaes and subpoenaes duces tecum either
its own instance or upon written application of a party to the hearing
never necessary to compel the attendance of witnesses and the intro-
tion of books, records, correspondence, documents, papers or any
er evidence which relates to any matter before the Commission.

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

(c) Failure to Obey Subpoena - Subpoenaes and subpoenaes
es tecum shall be enforced as provided in Chap. 29A-5-1(b) of the
t Virginia Code.

7.10 Procedure of Hearing

(a) Subject to the provisions of these regulations, the Hear-
Examiner shall have full authority and discretion to control the
cedure of the hearing, to admit or exclude testimony or other evidence,
to rule upon all motions and objections except where ruling on such
ion is expressly reserved to the Commission. The Hearing Examiner
inquire of any witness presented by any party. After notice of the
ring is issued and subject to the provisions of the Act the Hearing

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

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

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

(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.

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

(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.

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

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

7.12 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 for a conference to consider or by a pre-hearing memorandum require:

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

(2) The necessity or desirability of amendments to the pleadings;

(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.

(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.

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

(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.

(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 -

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

(1) depositions may be obtained only by motion served upon the parties and by order of the Hearing Examiner;

(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, sub-sets, sections or etc.;

(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.

(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:

(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.

(2) Hearing Preparation: Materials - Subject to the provisions of subdivision (b) (3) of this rule, a party may obtain discovery of documents and tangible things otherwise not discoverable under subdivision (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.

(3) Hearing Preparation: Experts. - Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(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.

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

(c) 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:

(1) that the discovery not be had;

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

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

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

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

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

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

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

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) apply to the award of expenses incurred in relation to the motion.

(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.

(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:

(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.

(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.

(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 -

(a) The parties may by written stipulation filed with the Hearing Examiner (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

(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.

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

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

7.15 Interrogatories to Parties -

(a) Availability; Procedures for Use. - Subject to the limitations and proviso of Rule 7.13(a) (2), (3) 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.

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 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). The party submitting the interrogatories may move for an order under Rule 7.17(a) with respect to any objection to or other failure to answer an interrogatory.

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

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 -

(a) Scope. - Any party subject to the proviso of Rule 7.13(a) may serve on any other party a request (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, drawings, 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) and which are in the possession, custody or control of the party upon whom the request is served; or (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).

(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.

The party upon whom the request is served shall serve a written response within 15 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.

(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 -

(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:

(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.

(2) If a party fails to answer an interrogatory submitted under Rule 7.15, or if a party, in response to a request for inspection submitted under Rule 7.16 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).

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(c).

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

(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 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 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 -

(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, the Hearing Examiner may make such orders in regard to the failure as are just, and among others the following:

(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;

(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;

(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;

(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.

(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 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.

(c) 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 (1) to appear before the officer who is to take his deposition, after being served with a proper notice, and order, or (2) to serve answers or objections to interrogatories submitted under Rule 7.15 after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted

under Rule 7.16, 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) by this section. In lieu of any order or in addition thereto, the Hearing Examiner may recommend to the Commission in the recommended order 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(c).

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 -

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.

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

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.

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.

7.24 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.

7.25 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.

Rule 8. THE RECORD

8.01 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.

Rule 9. FINAL ORDERS

9.01 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 9.06(a) on the issues.

9.02 Issuance of Order -

(a) If upon all the testimony, evidence and record of the hearing the Commission shall find that the respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in the Act, the Commission 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, 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.

(b) In addition to the remedies outlined in (a) above, the Commission 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.

(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 may determine.

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

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

9.04 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.

9.05 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.

9.06 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 reconsidred 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

10.01 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 11. DECLARATORY RULINGS - GUIDELINES

11.01 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.

11.02 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 12. CERTIFICATION

12.01 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 13. PUBLIC INFORMATION

13.01 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.

13.02 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).

13.03 Specific Exceptions to Rule 13.02 - Notwithstanding the provisions of Rule 13.02 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 an any court having competent jurisdiction.

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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED
MAY 22 1985
W.V. HUMAN RIGHTS COMM.

IN RE: Rules and Regulation of the Human Rights Commission

Transcript of the proceedings had at a Public Hearing held on May 9, 1985, at 1:00 p.m., in the Second Floor Hearing Room, West Virginia Human Rights Commission, Professional Building, Charleston, Kanawha County, West Virginia, pursuant to a published notice.

COMMISSIONERS:
Russel VanCleve, Chairman
Iris Bressler
Betty Hamilton
Betty Thornhill
Sid Allen
Nathaniel Jackson

APPEARANCES:
Emily A. Spieler, Esquire
Assistant Attorney General
West Virginia State Capitol Complex
Charleston, WV 25305

Maggie Beller, Civil Liberties Union
Charleston, West Virginia

BRENDA C. PARKER
Court Reporter — 965-3056
354 McNabb Drive
Elkview, WV 25071

PUBLIC MEETING

COMMISSIONER VANCLEVE: We will call to order this Public Hearing on the subject of the Rules and Regulations of the Human Rights Commission.

The original Rules were promulgated under emergency provisions as of the 8th day of March, 1985. In a notice dated the 25th day of March we noted it for Public Hearing, saying that it would be held at 1:00 p.m., Thursday, May 9, 1985, at the Commission's Office on Quarrier Street.

The Commissioners met briefly in executive session just to make sure that we agreed on what the ground rules were.

We see ouselves as being listeners and we hope that you will cater to our respective needs by being brief and succinct. If I feel that it is going on to long, I may ask you to make it shorter or just ask you to stop.

Who all is here who would like to provide input about these Rules and Regulations? Just a minute. I want to get all the names.

MS. EMILY SPIELER: Emily Spieler.

MS. MAGGIE BELLER: Maggie Beller; I'm not going to

comment. I am here representing the Civil Liberties Union.

COMMISSIONER. VANCLEVE: John, are you going to comment?

MR. RICHARDSON: I shall not speak to the rules to be accepted except to the extent that there are grammatical errors and some places where plurals need to be added and certain things done to correct that. Other than that, I will not speak to the substance of the rules.

COMMISSIONER VANCLEVE: We had some comment from Mike Kelly, who was here on another subject earlier, and we will put those into the record before the afternoon is over.

Roxanne, were you going to provide any input?

MS. ROGERS: No, I don't believe so.

COMMISSIONER VANCLEVE: Why don't you go first.

MS. SPIELER: I don't exactly consider myself a member of the public, but I did want to bring over some observations that had come up in the course of our handling of the backlog cases that I think would make processing the cases easier. I think that the more cases that we handle the more we become acquainted with the sort of ins and outs and the kinds of problems that can arise by the cases.

I brought, I think, enough copies. I am just, very briefly, going to summarize what they are about.

With regard to discovery, there are two things that the attorneys in my office have commented on. I have suggested ways of dealing with them. We feel that language should be added to this section on interrogatories that limits the number of interrogatories that can be ask and the number of sets that can be served without going to a hearing examiner.

Second, we would change the language of 7.13 (a) to basically lay out the different mechanisms we can use for discovery. First, that you can obtain it pursuant to the specific rules. Second, that you can go before a hearing examiner and ask that the scope of the matter and methods of discovery be expanded without limits. In other words, that you could request that - move for depositions, or expansion of interrogatories, or use of request for admission - or any mechanism that seems appropriate in the case.

The reason that we suggest that is that there are some cases where---- The cases vary a great deal in complexity. In certain situations a limit on the

interrogatories may not be appropriate, and therefore we feel that it should be left up to the hearing examiner upon motion to discussion an expansion of discovery. If we are going to allow the hearing examiner to do that, then we should allow it to be sorta opened up to any form of discovery that seems appropriate on a particular case.

Lastly, we have this language elsewhere now that the parties hereby stipulate and agree to pursue discovery in anyway that they want.

That is the first area, and I think that these changes would make the rules more useable.

COMMISSIONER VANCLEVE: You had an item four in there.

MS. SPIELER: That is the language that is in the old section and it is just a retention of that language. I personally am not certain that it is a necessity, but I have no objection to it's being in there. I know that there was considerable discussion about that before, so I was just leaving that in there. It is just a retention from the prior emergency rules.

Second, we are still having an enormous amount of

difficulty figuring out what the appropriate way of dealing with the file is. I don't have a definitive solution here. However, I think, that part of the problem arises from treating the respondent and the complainant as equals in these adjudicatory process in regard to the Commission file. It is my position, and I think that there's no legal basis for saying otherwise, that the file should be made available to the complainant and to the complaint's attorney during the adjudicatory phase without their being designated as counsel. At that point, if that is done then there would be specific discovery rules, with regard to the file, then would apply only to what the respondent could get out. It somewhat makes easier the mechanisms for dealing with this.

The administrative procedures that provides that you can introduce into evidence - and I only recently realized this - anything out of the Agency file. Especially in these older cases where witnesses are not available and we have signed statements, some of the attorneys are trying to introduce those statements into the record based upon this section of the law. Obviously, anything like that that is going to be introduced into evidence has to be discoverable

during the ajudicatory phase and there should be a provision for that in the discovery rules.

Thirdly, there is a kind of peculiar problem that we have had calls from respondent's attorneys that they don't have files anymore. The case is ten years old and they are the third attorney down the road, and they don't have a file on the case and they want to know what is in the file. The current rules theoretically don't let us send them correspondence with regard to conciliation. So they don't know what the respondent offered during the conciliation process, which is a fairly absurd situation. So I'm suggesting that it is not a violation of the provision of making conciliation information public to provide the respondent with that information which was the result of correspondence with them. That's, I think, a housekeeping matter.

The third general area has to do with case dismissal and closures and I think that this is more a problem on backlog cases. We will be seeing backlog cases for a number of years, but it is more a problem on backlog cases than on current cases. We are spending an incrediable amount of time

in the Attorney General's Office trying to deal with that respondent corporation that is out of business now, and did or did not sell some of his assets, and maybe there is and maybe there isn't somebody who we can reach on this case.

Then there is death of the complainants or respondents. First of all, a subsection should be added which provides for dismissal of complaints where the corporation is out of business and there is no one that you can reach for purposes of remedy. It is sort of a useless exercise to prove that they discriminated ten years ago if we can't get backpay. There is not perspective relief, and so those cases should be closed out. I, at this point, am sort of basically writing a letter to a hearing examiner saying, Gee, this is the situation in this case, what do you suggest that we do? In that situation, procedurally what should happen is that it should go out on a motion to dismiss from the opposing counsel, but that doesn't always happen and that leaves us with a procedural collabmeyer.

Second, cases where- we have a section now that says, "that when the complainant is deceased and the heirs want to pursue it, it won't be dismissed. " Actually, that

section is grammatically wrong, and it says that if the heirs want to pursue it will be dismissed, should we read it. Even assuming that we understand it's intent, we have a problem on cases where the heirs want to pursue it, but you can't prove the claim without the testimony of the complainant. I think that a provision needs to be made for the dismissal of those cases. It is an incrediable waste of our time to be litigating--- we feel obligated under the current rules to put that case on to be aired, irrespective of whether we know that it is absolutely unproveable because of the absence of the critical person. So we think that there should be a provision in the rules for that.

I might also add, kind of parenthetically, that we had cases on this issue before four different hearing examiners. I have suggested to Harry Taylor that, he suggested the hearing examiners will work out a procedure whereby that issue will be brought before the Commission for an order on the legal issue of the survivability of the claim before we go forward on the merits of the cases. What we foresee is one of the hearing examiners ruling one way and the other ruling another way. I think procedurally it would be

proper the way to proceed; he is considering suggesting that. So you may see those on a kind of interlocutory appeal, what should we do with those cases.

Then there is another problem with death, which we didn't consider at all previously, and that is, when the respondent is deceased. Those are mostly housing cases where there is an individual respondent. We have tried to amend those cases to go against the heirs of the property or, something, or the wife. I am not sure about the legality of that and then there are problems, again, with obtaining testimony because of certain provisions in the Dead Man's Statute. Again, we have cases in this category which are while not impossible to prove as a result of the way the law lines up. On this one I would defer to John, Roxanne, and Gail on what they think ought to be done on those cases, and whether there should be an additional subsection to the rule on that. Again, if we try to sort of keep our eye on the eight ball, we are supposed to be trying to be adjudicating claims in order to eradicate discrimination on an on going basis. These cases end up taking an exceptional amount of time and bear very little fruit, either for the individual or

for the general hopes of eradicating discrimination.

I will leave you those. I am extremely pressed for time. If you have any questions, I will be happy to answer them otherwise I'm going to leave.

COMMISSIONER VANCLEVE: Commissioners?

COMMISSIONERS: No response was given.

COMMISSIONER VANCLEVE: We thank you for good form and all the rest of it.

MS. SPIELER: Thank you.

COMMISSINER VANCLEVE: If my poll is correct, that is the only set of comments which have come to us. Other than those that Mike Kelly gave us this morning. In veiw of this Maggie do you want to reconsider.

MS. BELLER: As a matter of fact, after I said that I wasn't going to make a statement, maybe what I should have said was that I didn't have anything substantive to say. Ordinarily the Civil Liberties Union is on a list of interested agencies, or a list of parties that are to have direct notice of hearing, which I'm not aware that we got and Mr. Kozak is not aware that we got. Has there been a change in process.

COMMISSIONER VANCLEVE: Not to my knowledge, no.

Howard, can you respond to the question.

EXECUTIVE DIRECTOR KENNEY: We sent out, I don't know how many, notices to various groups and organizations.

MS. BELLER: Maybe what I ought to do is check with your office and make sure that they have a current address.

COMMISSIONER HAMILTON: You had no comment about the rules and regs as purposed?

MS. BELLER: As a matter of fact, I did a little checking and what I heard was quite positive.

COMMISSIONER VANCLEVE: Staff people, I had the distinct impression that there were certain things that had become apparent after we got into this that we ought to change. Then I hearing no input to that fact, I am having a hard time rationalizing these conflicting questions.

MR. RICHARDSON: What we would like to do, or what I would like to suggest that we be able to do, because of the time frame of getting things typed and getting it in form we have not been able to do that. In order to develop that properly, we would like the opportunity to provide that in a typed form for each of the persons to consider at such time as

they may want to do so. We have not been able to put that in a final form.

It would be a matter of going through each rule and pointing out the difficulties.

COMMISSIONER VANCLEVE: If I remember correctly, we were shown last night a schedule which says that both of you two attorneys are doing ten hearing each this month.

MR. RICHARDSON: Yes, sir.

COMMISSIONER VANCLEVE: I would suggest that time will be absolutely at a premium the for the next several weeks. We are advised that we are supposed to get the final form in within 30 days, I mean 90 days of the issuance of the emergency rules which means that we have to have it in by the 8th of June. Which precedes the next scheduled Commission meeting. It seems to me like that you are between a rock and a hard place, we are simply going to have to provide some mechanism whereby the Commissioners will be apprised of what else needs to be done and we as Commissioners can deal with it individually, use a telephone poll, polling of the Commissioners, with a confirming vote at the next Commission meeting to get it in by the 8th.

COMMISSIONER HAMILTON: Don't you think that part of that can be taken care of this afternoon and we can trust the staff to change the meanings with the compromises?

COMMISSIONER VANCLEVE: I would be perfectly happy to undertake it since we are in good shape on time.

Would it be possible, John, for us to go through these verbally in the next several minutes or ever how long and you point out to us what now you think needs to be done?

MR. RICHARDSON: It is possible. As an example, we can go to the definitions, which is Section 2, page 3, beginning page 3 and ending on page 4, and add thereunder a section 2.15 wherein we would define, as one of the things that Mr. Kelly brought to light, the word "service". Service where required shall be by certificate of service and effective upon depositing the same in the United States Mail except where otherwise required by Statute. That would definitively cure one of the service problems. That is one of the areas that we have had some difficulty.

It does not address his three day problem. It does effectively do that by not even suggesting a time period for the mail, because you just don't know; sometimes it's one

day and sometimes it's five days delay. So in order to take that into account, as they do in most courts, if someone with the proper authority signs the certificate of service indicating that's the date that they deposited it in the mail, that's an affidavit from them.

COMMISSIONER JACKSON: What you are saying is not that it was received by a period of time, you are pointing out the instrument by which you are issuing papers.

MR. RICHARDSON: And the date.

COMMISSIONER VANCLEVE: What is your next one.

MR. RICHARDSON: We ran into a problem with the reviews. Where we had previously used certified mail we changed the rule to allow a certificate of service. Norman can explain to the problems that his department has had with that one.

MR. LINDELL: If they are found no probable cause, what we are doing is that we are using a certificate of service and we are holding those cases approximately 15 days before they are turned in to me for closure. What is happening is that we are starting to get request for appeals around the 15th day. We have no way to know whether or not

that appeal is truly timely.

What we have done now is that Howard is just letting everybody have the appeal right, because we aren't using a certified card, like we used to. We don't have any way to know unless that person brings the envelope that it comes in as to whether or not he got the letter of determination and whether their appeal is timely.

COMMISSIONER VANCLEVE: What would you like to do about this?

MR. LINDELL: I think that we ought to go back to the green card.

MR. RICHARDSON: I think the abiding with the rule of the 10 days notice. Notice, in effect, would indicate that someone has gotten this piece of mail and they had ten days to respond to it, and we defined notice, I think, in the original definitions as being---

COMMISSIONER VANCLEVE: Excuse me. Why don't we just phrase it 15 days within the mailing of such a notice, instead of 10 days of receipt.

EXECUTIVE DIRECTOR KEENEY: Ten days is in the Statute.

One of the problems that cause this, is that you send the mail up to the State House and it will be held up there for two or three days until they get so much into a certain zip code and then it is mailed out because they can get it at a cheaper rate. So they do hold mail. So you don't know whether it is going to go out. You know, today you take it up and it will probably go out tomorrow because tomorrow is the end of the week, but Monday, Tuesday, or Wednesday it possibly could be held and that is one reason that we have gotten to the thing of, you know, this certificate of service. It is a real problem area and when we hear that we need to certify, because they hold mail because it saves money.

COMMISSIONER VANCLEVE: So the only solution is to use the green card. Is that a feasiable solution from your standpoint.

MR. LINDELL: That is the way that we used to do it. It is simply going back to the old system for us.

COMMISSIONER JACKSON: It seem like to me, that at times we are inconsistent. When you identify and define service, you say that you are going to use those kinds of

things as the fact, as it actually happened and now you are over here talking about notice and timeliness and you are trying to search for another thing. You have already said green cards, those kind of official signing off of agencies which is what we are going to use as an indicator and barometer for service you've got to say green card.

MR. LINDELL: The only answer is to go back to the green cards there is no other way to do it.

COMMISSIONER VANCLEVE: Then the text does not need to be changed?

MR. RICHARDSON: Right, and that's 4.08 (a).

COMMISSIONER VANCLEVE: Next.

MR. RICHARDSON: I will simply bring to the attention, not so much as to want to change Section 12, which involves - I'm sorry it is Section 11, which is on page 51 - involving Declaratory Ruling by The Commission - Procedure in the rule it cites Chapter 29A, Article 4, Section 1, which chapter, article, and section is not specifically referred to in that respect. Someone with good intentions, I'm sure, wanted to be able to do Declaratory Rulings.

The Commission except under a very broad

construction of it's powers and functions would be be able to do what was considered to be a Declaratory Ruling. That is to say, if a person inquires as to the legality of a specific way of doing things or a specific set of circumstances the Commission is not in a position to prejudge or grant to that person BFOQ or to make any prejudgement of a given set of facts that may later come before the Commission as a result of the complaint.

There is nothing to preclude the Commission from giving friendly advice about this practice has heretofore been considered to be unlawful. There is nothing wrong with that, but to make it a Declaratory Ruling, in other words, a judgement that these facts and circumstances are in fact unlawful is improper. Courts have that jurisdiction, Circuit Courts have that jurisdiction under given circumstances, Supreme Court of Appeals, and certain agencies are permitted to do that by Statute, but we have not been specifically delegated that authority under our Statute even though we refer to Chapter 29A, Article 5 and Article 3 - not to Article 4 - so to extend yourself into that is probably improper, not probably it is improper to do that to make a ruling on a set

of facts regardless of the circumstances. There is nothing wrong with educating people or giving friendly advice, but you can't make a adjustments, and that's what Rule 11 essentially permits.

COMMISSIONER HAMILTON: What was your thinking? Is this the one that you all locked horns on? I want to have the benefit of your thinking on it?

EXECUTIVE DIRECTOR KENNEY: I think that we need to go into that and there are some other things that we don't really need to get into discussion on the record here about our differences.

COMMISSIONER VANCLEVE: Is it your feeling that all of Section 11, therefore, should be deleted?

MR. RICHARDSON: Let me put it this way, I would not say that. It just means nothing. It is just so much writing on paper and it is misleading to people who read the Rules and think that you have the authority to do something when in effect when you ultimately get down and do it you find out that it is a nonbinding situation which means nothing except that it is good friendly advice, and I do think that that authority ought to be spareingly used in context where

people want to find exceptions.

Now where they are practicing something that is brought to your attention and you have heretofore dealt with it, I think that you can bring their attention to the fact that matters similar to this have been declared unlawful, but where they want to say look we are doing this would you declare it lawful you are on the other side of the spectrum where you want an exception. That exception, of course, would be called a BFOQ, and that I feel very sure would be a mistake on the part of the Commission to do that without a factual set of circumstances given to them via a complaint, because that would be a prejudgement of a situation and would mislead people and we have occasionally received them, I understand that they are rare. That should very carefully avoided.

In the occasion that we have before us, they cited our Rule saying give us the exception you got it in your Rules. It really should not be exercised even though it is there. It is a lot of difficulty to execise that. I would suggest that you not necessarily go through any severe procedure to take it our, but be aware of the fact that it should not be done without an awful lot of very careful and

close scruinty and try to couch it in such a way that it is friendly advice and not a ruling at all.

MS. FURGESON: John, just to clarify your point, even if the Commission decided to take out reference to the Declaratory Rule there is another provision which deals with guide lines. You would not have advocate removing those, would you?

MR. RICHARDSON: No. Just with the issuance of a non-binding Declaratory Ruling. I would like to say that in the discovery process, as Mr. Kelly and Ms. Spieler have indicated, as certain cap should be seriously considered on the number of questions permitted in interrogatories, and I think that the Commission is in a position to consider that seriously and put a cap on it. They also should contain a proviso following it alllowing the hearing examiner to expand upon that or to deal out sanctions for failure to observe that and create unnecessary paper work. Even though you don't have to answer over 40 questions, if you are bombarded by these things, the shear volume of paper that you have to read in order to deal with it, whether you deal with it or not, becomes a matter of time consumption that we don't have. So I

think that the proviso following the cap should allow the discreation to expand as well as to have sanctions available to the hearing examiner and to the Commission for those who willfully violate it and who continually do so.

COMMISSIONER HAMILTON: What sanctions do you recommend?

MR. RICHARDSON: Recommending the sanctions that are available to the hearing examiner under other portions of the Discovery just refer to those, "That he may impose such sanctions already available to him." In general language.

COMMISSIONER VANCLEVE: Such as?

MR. RICHARDSON: Those that are available to him now are the right to exclude, recommend payment of cost, to exclude certain evidence because it wasn't timely or was improperly obtained, or whatever, to recommend that the cost involved and the travel or witness fees or in prolonging the hearing or unnecessary motion, what have you, that those cost would he incurred be paid by the person responsible

.

With regard to timeliness, I need to inquire of you about the flow of Recommended Decisions on NPC Hearings,

No Probable Cause Hearings. Whether or not the time constraints in there, should not be hightened to the extent that, as you know, the period of time begins with the filing of the complaint to the time the hearing is ultimately held has been termed to be a 180 days, and if we consumed time upwards of 20 days in these NPC matters are we going to have some way of keeping those from being--- If their PC then is found and they are back into the system, that time counts against you - we need to find out how difficult it has been for you to review these recommendations and get them signed. In view of what our time lapse is, we need to tighten that up. I perceive that we are losing 30 days, thereabout, in the process, and it should be - we got 20 tied up, I think 10 to notify them, give them 10 days notice of the hearing there is 20 days that we pretty much have to have and then from that point forward we may need some cap on that. These people want to know when they walk out, when are we going to hear from you? It is open-end there is no real constraint. I think, that there ought to be some simply to keep the system from bogging down. There ought to also be considered the work load. We don't have dictation equipment and things to go out

and dictate these to you. You have to handwrite them out and you have to have the time to do that as well as to get them typed and properly setup. I would think that 10 days would be a reasonable time following the hearing that the Recommended Decision then will be rendered.

That would be for all Public Hearing, PC and you know changing it over. You know, they found no NPC that is why they are there getting the review, and if you go to PC, if you take longer than 10 days then that time is taken off the adjudicatoy process. So I think that if we try to do the whole process, and keep within 30 days , we would be well advised to try that. If you don't do it, there are no sanctions. That would at least put a rule down to show that you are trying to maintain some integrity.

COMMISSIONER VANCLEVE: Next.

Excuse me. On that last matter was there not also some consideration given to the idea that if you take time out to do an appeal on a NPC that you really ought not have the time of the appeal counted against the toll of the clock.

MR. RICHARDSON: I wish that we didn't, but we do.

We have no choice. As a practical matter the complainant would have every right, if we didn't meet that 180 days schedule and had to issue a notice of right to sue - which begins at the same time the complaint if filed - and at the time you had to issue that right to sue they have a right to a Mandamus under the Allen Decision.

It is quite true, I'm sure, that they would be tickled to death to find out that now they got a case going to hearing even though they are going to slap the hand that fed them, but nevertheless it is there that way. It is something that ought to be looked at, from the standpoint that someone is going to have to do these review hearing, you have got to have a Commission Attorney to do them. To get the decisions done and the process carried out you are going to have to have enough time to do that, and for the Chair to sign them, and proceed on into the next phase without any unnecessary delay. It put a notice on the Chair.

EXECUTIVE DIRECTOR KEENEY: I know that you are speaking in terms of Russ, but if George were to Chair the Commission you would have a whole different set of circumstances.

MR. RICHARDSON: You got mail and you got other problems.

EXECUTIVE DIRECTOR KEENEY: That is something that the Commission needs to think in terms of.

MR. RICHARDSON: I was just thinking of the Charleston situation, but you are quite right if you have an out of town Chairman, then 10 days is really slim.

Then we put no time constraint on it at all. That is a thought too. I suggest it simply because it helps keep things moving. Like I said too, if it doesn't happen and it doesn't move there is no sanction against the Commission for not having done it.

It is just a matter that some attorney is going to look at it and say you didn't get your ruling in timely.

EXECUTIVE DIRECTOR KEENEY: Since we are discussing this, the front-end of noticing someone that their hearing is on such and such a date, we have to allow 20 days mailing time and that is out experience. So we don't se the hearing any earlier than the 20th day, because the post office is going to hold that letter until it is picked-up or left there 15 or 16 days.

If they don't pick it up, then you have to turn around and send a regular letter. So you have a lot of lost time.

MR. RICHARDSON: You probably ought to do both at the same time.

We have got a problem with certified mail of people not wanting to pick it up because they may think that it is a summons to Court or some creditor sueing them, or whatever, they are hesitant to pick it up unless they know what it is.

EXECUTIVE DIRECTOR KEENEY: We have really never had that many refused, it is just that it is the last day. It is the 18th or 19th day that you get the green card back saying that they have gotten the notice. That 20 days is---

MR. RICHARDSON: It may be better in circumstances like that just to leave it open.

MS. FERGUSON: I just have one point in reference to page 50, Rule 9.06. I think that the provisions are sufficiently vauge that we probably need to add more meat to them in so far as to what the procedure will be upon reconsideration. I know first hand because I have had to deal

with the issue of reconsideration. I would suggest that we, not necessarily, come to a consciences on what the language should be but at least the issue of what the Commission does once it receives a Motion for Reconsideration from a party. What procedure the Commission will utilize to grant or deny that Motion to be addressed in to a Rule.

Also, the fact that the Rule already speaks in subparagraph (a) about the fact that the Motion will be served on all parties that we add that the other party ought to have an opportunity to respond to the Motion for reconsideration within a certain period of time, and that the Commission ought to be obligated to rule on the Motion within a certain time frame. I think within at least 30 days - I'm saying 30 days because the Commission only meets once a month.

So if you were to Rule on a Motion filed within 10 days and the other side would be given 10 days to respond to that, within 30 days the Commission ought to be in a position to Rule on the Motion.

I am not clear whether or not the Motion in and of itself sufficient enough to deal with the question of whether--- You make a Motion seeking reconsideration and

laying out all your issues and then whether you should have the opportunity to file a Brief or Memorandum in Support of your Motion which is customarily the way it is. Now the Commission aparently makes it's decision based on the Motion for reconsideration as to whether it will grant or deny the Motion.

If they deny the Motion there is no problem, but if they grant the Motion for Reconsideration, it is unclear as to whether they can then go ahead and rule on the substance of the Motion, it is the same Motion. It is quite difficult for me to explain, but I think that it needs to be set out clearer as to what basically the procedure should be and the respective rights of the party upon reconsideration.

The Commissions obligation to act within a reasonable time with relation to the Motion to Reconsider.

COMMISSIONER VANCLEVE: Okay. Anything elsse?

MR. RICHARDSON: We need to do something, I think, in the Rules to more adequately address consolidation and the authority of the hearing examiner to consolidate cases. For instance, where you have one individual who has filed two complaints - and I think that the Commission will recall that

we considered one of those yesterday evening, involving a matter where there was a coaching position involved - those two matters should be easily and should have been made a matter of one Public Hearing, but I think by virtue of there even being two sets of facts and two sets of circumstances, you still have the same parties. When that is true, they are easily combined into one hearing.

I think, even though I have not undertaken to formulate such a rule, that provision should be made available to the hearing examiner when he deems it appropriate and he can consolidate one or more cases, I mean two or more cases for hearing, without anything further being done except the parties agreeing to it. On Motion of the Parties, if they want to hear more than one case even though there has not been a notice, they can waive all that, that they be permitted to do that. If the Commission would entertain that, I would with the assistance of Roxanne, and the hearing examiners that have indicated that they would be glad to formulate a rule that would permit that type of consolidation.

COMMISSIONER VANCLEVE: Anything else?

NO RESPONSE.

COMMISSIONER VANCLEVE: It seems to me that we should close the Hearing.

(Hearing Adjourned.)

BRENDA C. PARKER
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REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

HUMAN RIGHTS COMMISSION, to wit:

I, the undersigned, Brenda C. Parker, Official Reporter for the West Virginia Human Rights Commission, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof, and that previous to the commencement of the examination of the witnesses, they were duly sworn by the undersigned to testify the truth in relation to the matters about which they were interrogated in the hearing held on April 24, 1985.

Given under my hand this 8th day of May, 1985.

Brenda C. Parker

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