Emergency

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

November 1, 1984

Honorable A. James Manchin
Secretary of State
State Capitol Building, Suite 157-K
Executive Office
Charleston, WV 25305

Dear Secretary Manchin:

Attached for filing is the original and one copy of procedural Emergency Rules promulgated and ratified by the WV Human Rights Commission on October 11, 1984, at its regularly scheduled meeting, pertaining to practices and procedures before the WV Human Rights Commission. Also included is an original and copy of a statement as to what circumstances constitute the promulgation of the emergency procedural rules.

Concurrently, we are filing with Legislative Rule Making 16 copies of the exact documents filed with your office.

The Commission will within 90 days of said filing initiate regular rule making procedures for permission to promulgate regular procedural rules to replace the aforementioned emergency rules.

Please advise if there are any questions.

Sincerely,

Howard D. Kenney

Howard D. Kenney
Executive Director

FILED
1984 NOV -2 PM 1:12
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

HDK/elm

Attachments

FILED

STATEMENT OF FACTS CONSTITUTING THE PROMULGATION OF EMERGENCY RULES PERTAINING TO PRACTICE & PROCEDURE BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

'84 NOV -2 PM 1:18

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

The herein promulgated emergency rules pertaining to practice and procedure before the West Virginia Human Rights Commission (WVHRC) pursuant to West Virginina Code 5-11-8 d(h), are procedural as that term is defined in West Virginia Code 29A-1-2.

As enumerated in West Virginia Code 29A-3-15(e), the promulgation of these rules have been designed and are necessary to prevent substantial harm to the public interest of the State of West Virginia in the elimination of discrimination, tempered by fundamental fairness to all parties. A crisis exists at the WVHRC, brought to fore by the recent mandamus action in the West Virginia Supreme Court of Appeals against that agency, Allen et al. v. WVHRC, in which 400 cases are and have been awaiting public hearing before the Commission for a number of years.

The foregoing procedural emergency rules, with the exception of Section 5.03, are fashioned after and necessary modifications of the present West Virginia rules of civil procedure, and will enable the Commission to expedite the backlogged cases for hearings and do so in an orderly efficient manner while protecting the rights of complainants and respondents.

Emergency rule 5.03 has been promulgated to clarify, set limits upon and expand upon the grounds and procedure for continuances. The problem of continuances has been a major contributing factor in preventing a deflation or decrease in the Commission's backlog of cases for public hearing.

The WVHRC ratified and adopted for filing the foregoing procedural emergency rules at its regularly scheduled Commission meeting on October 11, 1984.

WV HRC
WV Code §5-11
Series II

PROMULGATED EMERGENCY PROCEDURAL RULES

GOVERNING PRACTICE & PROCEDURE BEFORE THE

WEST VIRGINIA HUMAN RIGHTS COMMISSION

A STATE ADMINISTRATIVE AGENCY

FILED
1994 NOV -2 PM 1:17
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Section 5. NOTICE OF HEARING

5.03. ~~Extension of Time - Upon application, Chairperson Executive Director, for good cause shown, may extend the date on which a hearing has been set.~~

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 one requesting it that would be caused if denied.

(a) For extraordinary cause shown the hearing examiner may in his discretion 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) Applications for continuances shall be filed without delay with the hearing examiner after the grounds therefore become known to the party.

(1) All such applications for continuance shall be in writing and must be supported by affidavit of the party or the party's attorney showing extraordinary 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 application for continuance. Objections raised to the filing of such application shall be submitted in writing to the hearing examiner within five (5) days of receipt of said application for continuance.

(c) Oral applications 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 application (b) the lateness of the application was not caused by undue delay or lack of diligence by the applicant. If the application for continuance is oral, the resistance may be oral, but both must be committed to writing for the record.

(d) The total period for an extension shall not exceed twenty (20) days.

(e) Written notice of the grant or denial of a continuance request shall be provided to all parties by the hearing examiner.

(f) 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, within the time proscribed in subsection (d) above.

~~7.09 Pre-hearing Conference~~

~~(a) Purpose. A pre-hearing conference may be held at the discretion of the Hearing Examiner preparatory to any hearing. The pre-hearing conference shall be an informal proceeding conducted fairly and expeditiously by the Hearing Examiner for the purpose of considering:~~

~~(1) The simplification of issues;~~

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

~~(3) The possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;~~

~~(4) The limitation of the number of expert witnesses;~~

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

~~(b) Pre-hearing Statement. The Hearing Examiner shall make a written report which recites the action taken at the pre-hearing conference, the amendments allowed to the pleadings, and agreements made by the parties as to any of the matters considered which limit the issues before the Commission to those not disposed of by admission or agreement at the pre-hearing conference. Such a statement shall be made a part of the record and when entered shall control the subsequent course of action, unless modified thereafter to prevent manifest injustice. The Hearing Examiner shall at the start of the hearing, after preliminary motions have been considered, read into the record his statement regarding the scope of the hearing as defined in the pre-hearing conference. Objections to the pre-hearing statement may be noted on the record for appeal purposes.~~

7.09 Subpoenaes

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

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

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

~~7.10 Submission of Documentary Evidence in Advance - When practicable, the Hearing Examiner may require:~~

~~(a) That all documentary evidence which is to be offered during the taking of evidence be submitted to the Commission and to the other parties to the proceeding sufficiently in advance of taking of evidence to permit study and preparation of cross-examination and rebuttal evidence;~~

~~(b) That documentary evidence not submitted in advance, as may be required by subdivision (a), be not received in evidence in the absence of a clear showing that the offering party had good cause for his failure to produce the evidence sooner;~~

~~(c) That the authenticity of all documents submitted in advance in a proceeding in which such submission is required, be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.~~

7.10 Procedure of Hearing

(a) Subject to the provisions of these regulations, the Hearing Examiner shall have full authority and discretion to control the procedure of the hearing, to admit or exclude testimony or other evidence, and to rule upon all motions and objections except where ruling on such motion is expressly reserved to the Commission. The Hearing Examiner shall make full inquiry into all the facts in issue and shall obtain a full and complete record of all facts necessary for a fair determination of the issues.

(b) The Hearing Examiner may call and examine witnesses, direct the production of papers or other matter present in the hearing room, and introduce the same into the record of the proceeding. Subject to the provisions of the Act the Hearing Examiner may issue subpoenaes and subpoenaes duces tecum in furtherance of his duties and obligations.

(c) Limitation on Hearing Examiner - On any question which would be determinative of the jurisdiction of the Commission or the culpability of any party, the Hearing Examiner may not rule but may only recommend proposed findings of law and fact.

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

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

~~7.11---Subpoenaes~~

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

~~issuance of such subpoenaes and subpoenaes duces tecum at the instance of a party other than the Commission shall depend upon a showing of the necessity therefor.~~

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

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

7.11 Pre-Hearing Discovery

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

~~7.12 Procedure of Hearing -~~

~~(a) Subject to the provisions of these regulations, the Hearing Examiner shall have full authority and discretion to control the procedure of the hearing, to admit or exclude testimony or other evidence,~~

~~and to rule upon all motions and objections except where ruling on such motion is expressly reserved to the Commission. The Hearing Examiner shall make full inquiry into all the facts in issue and shall obtain a full and complete record of all facts necessary for a fair determination of the issues.~~

~~(b) The Hearing Examiner may call and examine witnesses, direct the production of papers or other matter present in the hearing room, and introduce the same into the records of the proceeding. Subject to the provisions of the Act the Hearing Examiner may issue subpoenaes and subpoenaes duces tecum in furtherance of his duties and obligations.~~

7.12 Pretrial Procedure; Formulating Issues.

In any action, the Hearing Examiner may in his/her discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

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

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

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

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 admissions 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 in his/her discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided. Objections to the pre-hearing statement may be noted on the record for appeal purposes.

~~7.13 Limitation on Hearing Examiner - On any question which would be determinative of the jurisdiction of the Commission or the culpability of any party, the Hearing Examiner may not rule but may only recommend proposed findings of law and fact.~~

7.13 General Provisions Governing Discovery -

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon written questions; depositions at the discretion of the hearing examiner; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the hearing examiner orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(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 at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissable evidence.

(2) Trial Preparation: Materials - Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise 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.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for

an order. The provisions of Section 7.20(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(3) Trial 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:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the hearing examiner may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the hearing examiner may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Section 7.18(b) or upon a showing of exceptional circumstances under which it is impracticable for

the party seeking discovery to obtain facts or opinions on the same subject by other means.

(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 Section 7.20(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 Continuation and Adjournments. The Hearing Examiner may continue a hearing from day to day or adjourn it to a later date or to a different place by announcement thereof at the hearing or by appropriate notice to all parties.~~

7.14 Stipulations Regarding Discovery Procedure

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.

~~7.15 Motions and Objections at Hearing. Motions made during a hearing and objections with respect to the conduct of a hearing, including objections to the introduction of evidence, shall be stated orally and shall, with the rulings of the Hearing Examiner, be included in the stenographic report of the hearing.~~

7.15 Depositions Upon Written Questions

(a) Serving Questions; Notice. - After notice of public hearing, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Secion 7.09. The deposition of a person confined in prison may be taken only by leave of Commission on such terms as the Commission prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is

not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency.

Within 15 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 5 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 5 days after being served with redirect questions, a party may serve recross questions upon all other parties. The Hearing Examiner may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. - A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of Filing. - When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

~~7.16 Waiver of Objections - Any objection not duly urged before the Hearing Examiner or Chairperson, as appropriate, shall be deemed waived unless the failure or neglect to urge such objection shall be excused for cause by the Hearing Examiner or Chairperson, as appropriate.~~

7.16 Interrogatories to Parties -

(a) Availability; Procedures for Use. - Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served 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. The Hearing Examiner may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Section 7.20(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 Section 7.13(b), and the answers may be used to the extent permitted by the rules of evidence.

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.

(c) Option to Produce Business Records. - Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

~~7.17 Separation of Witnesses. The Hearing Examiner may, within his discretion, or upon motion of a party, order the separation of witnesses.~~

7.17 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. - Any party 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, phonorecords, 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 Section 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 Section 7.20(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 action against a person not a party for production of documents and things and permission to enter upon land.

~~7.18 Witnesses. No testimony shall be received from a witness except under oath or affirmation.~~

7.18 Physical and Mental Examination of Persons

(a) Order For Examination. - When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Hearing Examiner may order the party to submit to a physical or mental examination by a physician or other qualified expert or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician or Other Qualifed Expert. - (1) If requested by the party against whom an order is made under Section 7.17(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or other qualified expert setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The Hearing Examiner on motion may

make an order against a party requiring delivery of a report on such terms as are just, and if the physician or other qualified expert fails or refuses to make a report the hearing examiner may exclude his testimony if offered at the hearing.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or other qualified expert in accordance with the provisions of any other rule.

~~7.19 Rules of Evidence.~~

~~(a) Pursuant to §29A-5-2 of the West Virginia Code, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of the State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The Commission shall be bound by the rules of privilege recognized by law.~~

~~(b) When objection is made to the admissibility of evidence, such evidence may be received subject to a later ruling. The Hearing Examiner may in his discretion, either with or without objection, exclude inadmissible evidence or order cumulative evidence discontinued. Parties objecting to the introduction of evidence shall state the precise grounds of such objection at the time such evidence is offered. Any party to the hearing may vouch the record as to any excluded testimony or other evidence.~~

~~(c) All evidence, including papers, records, staff memoranda, and documents in possession of the Commission, of which it desires to abet itself, may be offered and made a part of the record of the hearing.~~

~~(d) Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.~~

~~(e) Written stipulations of fact may be introduced in evidence if signed by the person sought to be bound thereby or by his attorney. Oral stipulations may be made in the record of hearing. The Commission expects the parties to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached, including all material facts that are not or fairly should not be in dispute.~~

7.19 Requests for Admission -

(a) Request for Admission. - A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Section 7.13(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any

documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 15 days after service of the request, or within such shorter or longer time as the Hearing Examiner may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Section 7.20(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the Hearing Examiner determines that an objection is justified, it shall order that an answer be served. If the Hearing Examiner determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served. The Hearing Examiner may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to hearing. The provisions of Section 7.20(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. - Any matter admitted under this rule is conclusively established unless the Hearing Examiner on motion permits withdrawal or amendment of the admission. Subject to the provisions of Section 7.12 governing amendment of a pre-trial order, the Hearing Examiner may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Hearing Examiner that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

~~7.20. Depositions. Evidentiary depositions may be taken and read as in civil actions in the circuit courts of this State by the Commission, or by any party to a hearing.~~

7.20 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) Hearing Examiner. - An application for an order to a party may be made to the Hearing Examiner.

(2) Motion. - If a deponent fails to answer a question propounded or submitted under Section 7.15(a) or a corporation or other entity fails to make a designation under Section 7.15(a), or a party fails to answer an interrogatory submitted under Section 7.16, or if a party, in response to a request for inspection submitted under Section 7.17 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 he applies for an order.

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 Section 7.13(c).

(3) Evasive or Incomplete Answer. - For purposes of this sub-division 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 Commission shall, after opportunity for hearing, require 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 substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the Hearing Examiner shall, after opportunity for hearing, require 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 Commission finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the Commission may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order. -

(1) Sanctions by Hearing Examiner Where Deposition is Taken. - If a deponent fails to be sworn or to answer a question after being directed to do so by the Hearing Examiner, the failure may be considered a contempt of that Hearing Examiner.

(2) Sanctions by the Hearing Examiner. - If a party or an officer, director, or managing agent of a party or a person designated under to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or

Section 7.18, the Hearing Examiner may make such orders in regard to the failure as are just, and among others the following:

(A) 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;

(B) 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;

(C) 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;

(D) 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 except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Section 7.18(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the Hearing Examiner shall require the party failing to obey the order or the attorney advising him or both to 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) Expenses on Failure to Admit. - If a party fails to admit the genuineness of any document or the truth of any matter as requested under Section 7.19, and if the party requesting the admissions thereafter prove the genuineness of the document or the truth of the matter, he may apply to the hearing examiner for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The hearing examiner shall make the order unless he finds that (1) the request was held objectionable pursuant to Section 7.19(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) 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, or (2) to serve answers or objections to interrogatories submitted under Section 7.16 after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Section 7.17, 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 under paragraphs (A), (B), and (C) of sub-

division (b)(2) of this section. In lieu of any order or in addition thereto, the hearing examiner shall require the party failing to act or the attorney advising him or both to 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.

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 Section 7.13(c).

(e) Expenses Against the State. - Except to the extent permitted by statute, expenses and fees may not be awarded against the state under this rule.

~~7.21 -- Issues Not in the Pleadings - When issues not raised in the complaint, as amended or supplemented, 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 part at any time, even after final order; but failure to so amend shall not affect the adjudication of the hearing of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the Hearing Examiner may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to show that admission~~

~~of such evidence would prejudice him in maintaining his defense on the merits. The Hearing Examiner may grant a continuance to enable the objecting party to meet such evidence~~.

7.21 Default by Respondent -

(a) Finding of a Default - If a respondent fails to appear, answer, or otherwise defend, or, having appeared or answered, does not present evidence or otherwise defend the case at the hearing, the Commission shall find the respondent to be in default and shall find the facts alleged in the complaint to be true.

(b) When Answer or Defense Permitted After Motion for Default - A respondent may answer or defend after a pre-hearing motion for default has been served and filed, and if the respondent shows by answering statement that it is then in compliance with the rules, the motion for default shall be denied.

(c) No Defense After Default - A respondent may not answer or defend after the Commission has found the respondent to be in default, unless the respondent obtains relief under subsection (e) of this section.

(d) Order When Default - Upon finding a respondent to be in default, the Commission shall order the respondent to do the things requested as relief in the complaint or to do such of those things as the Commission finds are appropriate on the basis of the information before it. The Commission may receive evidence for the purpose of determining appropriate relief.

(e) Setting Aside Default Order - A party against whom an order has been issued by default may, within ten days after the date when the

party was served with the order, move to set aside the order and finding. A motion to set aside a default order shall be granted only if the motion and supporting affidavits show that the party has a reasonable excuse for not appearing or defending, or if it would be clearly unjust to hold the party to the order.

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

~~(a) The Hearing Examiner shall permit the parties or their attorneys to present oral arguments at the Hearing and to file briefs within such time limit as the Hearing Examiner may determine, subject however, to the time limitation set forth in subsection 7.22(c) below. Oral argument shall not be included in the transcript of testimony unless the Hearing Examiner so directs.~~

~~(b) At the close of the hearing the Hearing Examiner may order or shall permit the parties to submit a suggested decision to the Commission and the Hearing Examiner within such time limits as the Hearing Examiner may determine, subject however to the time limitation set forth in subsection 7.22(c) below. A suggested decision shall include suggested findings of fact, conclusions of law and arguments in support thereof, along with the final order by the Commission which the party desires. The parties affected by such suggested decision shall be permitted to file exceptions in writing within such time limit as the Hearing Examiner may determine, subject however, to the time limitation set forth in subsection 7.22(c) below.~~

~~(c) The Hearing Examiner shall submit a proposed order and decision accompanied by findings of fact and conclusions of law to the~~

~~Commission and to all parties to the hearing within one hundred eighty (180) days of the completion of the hearing. The parties affected shall be given fifteen (15) days within which to file, in written form only, exceptions to said proposals and findings and present, in written form only, argument in support of said exceptions to the Commission. In the event that the Hearing Examiner shall fail to submit such decision and findings within the above one hundred eighty (180) day time limitation, such failure to submit shall be considered a proposed finding of no unlawful discriminatory practice and a denial of all allegations contained in the complaint concerned in the hearing. The Commission shall then proceed to enter its own findings and decision based upon the record of all testimony, exhibits, briefs and arguments submitted by the parties in connection with the hearing, pursuant to Section 9 below.~~

7.22 ~~Relief From Judgment or Order~~

(a) Clerical Mistakes. - 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 §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.

~~7.23 Improper Conduct~~

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

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

7.23 Rules of Evidence -

(a) Pursuant to §29A-5-2 of the West Virginia Code, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of the State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The Commission shall be bound by the rules of privilege recognized by law.

(b) When objection is made to the admissibility of evidence, such evidence may be received subject to a later ruling. The Hearing Examiner may in his discretion, either with or without objection, exclude

inadmissible evidence or order cumulative evidence discontinued. Parties objecting to the introduction of evidence shall state the precise grounds of such objection at the time such evidence is offered. Any party to the hearing may vouch the record as to any excluded testimony or other evidence.

(c) All evidence, including papers, records, staff memoranda, and documents in possession of the Commission, of which it desires to abet itself, may be offered and made a part of the record of the hearing.

(d) Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(e) Written stipulations of fact may be introduced in evidence if signed by the person sought to be bound thereby or by his attorney. Oral stipulations may be made in the record of hearing. The Commission expects the parties to stipulate the evidence to the fullest extent to which complete or qualified agreement can be reached, including all material facts that are not or fairly should not be in dispute.

~~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 respondent shall be so notified and given the opportunity to provide its own reporter at the hearing at the respondent's 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.~~

7.24 Depositions - Evidentiary depositions may be taken and read as in civil actions in the circuit courts of this State by the Commission, or by any part to a hearing.

~~7.25 Reopening Hearings. At any time afer a hearing has closed, but prior to a final determination, the Chairperson may on his own motion, or upon motion by any party, reopen the proceeding to receive further evidence or argument.~~

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

~~7.26 Reimbursement of Hearing Examiners.~~

~~Subsequent to submission of proposed findings and decision in a public hearing, a Hearing Examiner shall submit a bill for services~~

~~rendered to the Commission. In the event that a Hearing Examiner has failed to submit findings and a decision within the time limitation contained in Section 7.22(c) above, reimbursement shall be limited to the number of hours actually spent by that Hearing Examiner in conducting the public hearing. In all cases the final amount of reimbursement to any Hearing Examiner shall be subject to amendment and final approval by the Commission.~~

7.26 Oral Argument, Briefs and Findings -

(a) The Hearing Examiner shall permit the parties or their attorneys to present oral arguments at the Hearing and to file briefs within such time limit as the Hearing Examiner may determine, subject however, to the time limitation set forth in subsection 7.26(c) below. Oral argument shall not be included in the transcript of testimony unless the Hearing Examiner so directs.

(b) At the close of the hearing the Hearing Examiner may order or shall permit the parties to submit a suggested decision to the Commission and the Hearing Examiner within such time limits as the Hearing Examiner may determine, subject however to the time limitation set forth in subsection 7.26(c) below. A suggested decision shall include suggested findings of fact, conclusions of law and arguments in support thereof, along with the final order by the Commission which the party desires. The parties affected by such suggested decision shall be permitted to file exceptions in writing within such time limit as the Hearing Examiner may determine, subject however, to the time limitation set forth in subsection 7.26(c) below.

(c) The Hearing Examiner shall submit a proposed order and decision accompanied by findings of fact and conclusions of law to the Commission and to all parties to the hearing within sixty (60) days of the completion of the hearing. The parties affected shall be given fifteen (15) days within which to file, in written form only, exceptions to said proposals and findings and present, in written form only, argument in support of said exceptions to the Commission. In the event that the Hearing Examiner shall fail to submit such decision and findings within the above sixty (60) day time limitation, such failure to submit shall be considered a proposed finding of no unlawful discriminatory practice and a denial of all allegations contained in the complaint concerned in the hearing. The Commission shall then proceed to enter its own findings and decision based upon the record of all testimony, exhibits, briefs and arguments submitted by the parties in connection with the hearing, pursuant to Section 9 below.

7.27 Improper Conduct -

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

(b) Television, newsreel, motion picture, still or other cameras may be operated in the hearing room while the public hearing is in progress only with the permission of the Hearing Examiner. No lights or other devices may be used in connection with such cameras (other than those employed to light the hearing room.) 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.

7.28 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 respondent shall be so notified and given the opportunity to provide its own reporter at the hearing at the respondent's 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.

7.29 Reopening Hearings - At any time afer a hearing has closed, but prior to a final determination, the Chairperson may on his own motion, or upon motion by any party, reopen the proceeding to receive further evidence or argument.

7.30 Reimbursement of Hearing Examiners -

Subsequent to submission of proposed findings and decision in a public hearing, a Hearing Examiner shall submit a bill for services rendered to the Commission. In the event that a Hearing Examiner has failed to submit findings and a decision within the time limitation contained in Section 7.26(c) above, reimbursement shall be limited to the number of hours actually spent by that Hearing Examiner in conducting the public hearing. In all cases the final amount of reimbursement to any Hearing

Examiner shall be subject to amendment and final approval by the Commission.