WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Nov 16, 1990
ADMINISTRATIVE LAW DIVISION

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

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

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES___, NO_x_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 3

TITLE OF RULE BEING FILED AS AN EMERGENCY: Rules Regarding Religious Discrimination

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

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached sheet.

Use Additional Sheets If Necessary.

3.40

DATE: 16 November 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Human Rights Commission

EMERGENCY RULE TITLE: Rules Regarding Religious Discrimination

1. Date of filing: 16 November 1990

2. Statutory authority for promulgating the emergency rule: W. Va. Code §§ 5-11-8(h) and 29A-3-15(g)

3. Date of filing of proposed legislative rule: 16 November 1990

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

The rule adopts new language.

5. Has the same or similar emergency rule previously been filed and expired?

No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

See attached sheet.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See answer to Question No. 6.

RULES REGARDING RELIGIOUS DISCRIMINATION
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Response to Questions No. 6 & 8

A. Due to a volunteer hearing examiner project entered into with the West Virginia State Bar, and the hiring of a new staff hearing examiner, the Human Rights Commission will hold close to one hundred fifty hearings over the next twelve months. A number of those hearings will involve charges of religious discrimination filed after the filing of this rule.

B. The West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., does not state clearly whether it covers only overt discrimination on the basis of religion, or whether, like federal law, it requires that a reasonable accommodation to an individual's religion be made so long as such accommodation does not impose an undue hardship. The West Virginia Supreme Court of Appeals has not issued any ruling interpreting the Human Rights Act's coverage of religious discrimination.

C. The proposed rule faithfully reflects the current body of federal law regarding religious discrimination.

D. The proposed rule is necessary to assist all persons in understanding their rights, obligations, and duties under the Human Rights Act regarding religious discrimination, and to provide minimal protection to such minority religions as the Seventh-Day Adventists and the Worldwide Church of God.

E. Unless filed as an emergency rule, persons (including employees, employers, and places of public accommodations) will be making critical legal decisions, and facing potential legal liability, without benefit of the clear guidelines offered by the rule. There is an immediate need for the rule as a tool in assisting the hearing examiners in determining legal liability in cases of religious discrimination.

F. Failure to file the rule as an emergency rule would do substantial harm to the public interest in that persons may be held legally liable for acts of discrimination, or may forego the exercise of their rights, without full benefit of the explanation of competing rights and interests offered by this rule.

RULES REGARDING RELIGIOUS DISCRIMINATION
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Attachment to Form #7

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ADMINISTRATIVE LAW DIVISION

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION

SERIES 3
RULES REGARDING RELIGIOUS DISCRIMINATION

§77-3-1. General.

1.1. Scope -- The following legislative regulations of the West Virginia Human Rights Act (HRA), W. Va. Code § 5-11-1 et seq., set forth rules for complying with the Act's prohibition against discrimination on the basis of religion and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the HRA.

1.2. Authority -- These regulations are issued under authority of W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq.

1.3. Filing Date -- These regulations are promulgated on the _____ day of _____, 1990, and filed on the _____ day of _____, 1990, in the Office of the Secretary of State.

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

§77-3-2. Definitions.

2.1. "Religion" means and includes:

2.1.1. All aspects of religious observance and practice, as well as belief.

2.1.2. Moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. The fact that no religious group espouses such beliefs or that the religious group to which the individual professes to belong may not accept such belief will not conclusively determine whether the belief is a religious belief of the employee or prospective employee.

2.1.3. A religious practice or belief that is not absolutely mandated by a religious group but is a well established tradition among members of a faith.

2.2. "Religion" does not include:

2.2.1. Mere personal preferences or codes.

2.2.2. Social or political beliefs of a narrow, temporal character that are not intimately associated with religious convictions shared by an organized group.

2.3. "Reasonable accommodation" means reasonable modifications or adjustments and is determined on a case-by-case basis.

2.4. "Undue hardship" means that an accommodation would require more than a **de minimis** cost to the employer.

§77-3-3. Employment Discrimination Prohibited; Obligation to Make Reasonable Accommodations.

3.1. No employer shall, on the basis of religion, discriminate against an individual concerning the terms, conditions, or privileges of employment unless it can be shown that the employer cannot reasonably accommodate an employee's or a prospective employee's religious observance or practice without undue hardship on the conduct of its business.

3.2. The duty not to discriminate on religious grounds includes an obligation on the part of the employer, and/or a labor organization, if applicable, to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship to the conduct of the employer's business. Because of the particularly sensitive nature of refusing to hire or discharging an individual on account of his/her religious beliefs, the burden of proof that the accommodations required by the individual's religious needs impose an undue hardship to the conduct of the employer's business, is on the employer. Resolution of such cases depends on specific factual circumstances and involves a delicate balancing of an applicant or employee's religious needs with the degree of disruption imposed on the employer's business operation.

3.3. It is an unlawful employment practice for an employer to refuse to hire an applicant for employment or to discharge an employee who regularly observes Friday evening and Saturday, or some other day of the week, as the Sabbath or who observes certain special religious holidays during the year and, as a consequence, does not work on such days, unless the employer can prove that there exists no reasonable accommodation of such religious needs or that such accommodations can only be made at the price of undue hardship.

3.4. Reasonable accommodation includes, but is not limited to:

3.4.1. Voluntary substitutes or swaps where a substitute with substantially similar qualifications is possible. The obligation to accommodate requires that an employer take affirmative steps to attempt to secure substitutions and swaps.

3.4.2. Flexible work schedules such as flexible arrival and departure times; optional holidays; use of lunchtime in exchange for early departure; staggered work hours; use of accumulated compensatory time for time lost due to observance of religious practices.

3.4.3. A lateral transfer and change of job assignment.

3.4.4. When applicable, initiation of a discussion with a union regarding an exception to a collective bargaining agreement.

3.5. A refusal to accommodate is justified only when an employer can demonstrate that an undue hardship would in fact result from **each** available alternative method of accommodation.

3.6. When more than one means of accommodation would not cause undue hardship, the employer must offer the alternative that least disadvantages the employee with respect to his/her employment opportunities.

3.7. The Commission will determine what constitutes more than a **de minimis** cost with due regard given to the identifiable cost in relation to the size and operating cost of the employer and the number of individuals who will require a particular accommodation. Generally, a regular cost, such as the continual payment of a premium wage to a substitute, will constitute undue hardship. However, the infrequent or temporary payment of premium wages to a substitute while a more permanent arrangement is being sought are costs that the employer will usually be required to bear. Administrative costs of rearranging schedules or duty rosters will generally not constitute more than **de minimis** costs.

3.8. A mere assumption that many more people, with the same or similar religious practices as the person being accommodated, may also need accommodation, is not evidence of undue hardship.

3.9. Undue hardship may be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices and doing so would deny another employee his or her job or shift preference guaranteed by that system. Arrangements for voluntary substitutes and swaps do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in these rules precludes an employer and a union from including arrangements for

voluntary substitutes and swaps as part of a collective bargaining agreement. Nothing in these rules should be interpreted as excluding seniority systems, bona fide or otherwise, from scrutiny.

3.10. An employer must accommodate an employee who refuses to perform certain tasks because of his/her religion unless those tasks are an essential function of the employee's position or cannot be reasonably reassigned to another employee.

3.11. An employer must accommodate an employee who refuses to comply with a dress or appearance code for religious reasons unless it can demonstrate that this refusal would violate an established health or safety code. A need of the employer to maintain a certain public image will not amount to undue hardship unless the employer can show that accommodation would have a detrimental impact on its business.

§77-3-4. Religious Harassment.

4.1. Harassment in the workplace on the basis of religion is an unlawful employment practice. Unwelcome comments, jokes, acts and other verbal or physical conduct may constitute religious harassment when:

4.1.1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

4.1.2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

4.1.3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

4.2. An employer is responsible for its acts and those of its agents and supervisory employees with respect to religious harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

4.3. With respect to persons other than those mentioned in 4.2. above, an employer is responsible for acts of religious harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took timely and appropriate corrective action.

§77-3-5. Selection Practices.

5.1. The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

5.2. It is an unlawful employment practice for any person to elicit or attempt to elicit any information directly or indirectly pertaining to the religion of applicants for employment. Examples of such a practice include the use of the following inquiries:

5.2.1. Requesting applicant's religious denomination, affiliation, church, parish, pastor, or religious holidays observed; representing to applicants that an employer is of a predominant or particular religious orientation.

5.2.2. Inquiry asking specifically for the religious affiliation of schools attended by the applicant.

5.2.3. Requirement of submission of a religious reference.

5.2.4. Any inquiry into willingness to work any particular religious holiday.

5.2.5. Requesting a list of all clubs, social fraternities, societies, lodges, or organizations to which the applicant belongs, other than trade, professional or service organizations.

5.3. The use of pre-selection inquiries which determine an applicant's availability may be considered to violate the West Virginia Human Rights Act unless the employer can show such inquiries:

5.3.1. Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for religious practices; or

5.3.28. Were otherwise justified by business necessity.

5.4. Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest, but which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example

of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these rules, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

5.5. The Commission may infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification, and after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

5.6. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these rules apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

5.7. Nothing in this regulation prohibits an applicant from voluntarily providing a potential employer with information which would aid in the employer's compliance with any statute, state or federal, or affirmative action plan.

5.8. Pre-employment inquiries which are made in conformance with the instructions from, or the requirements of, an agency or agencies of the local, state or federal government in connection with the administration of a fair employment practices program will not constitute evidence of unlawful employment discrimination.

§77-3-6. Application to Labor Organizations, Employment Agencies, and Apprentice Training Programs.

6.1. In addition to employers, the rules set forth in this series shall also apply, when relevant, to labor organizations, employment agencies, and joint labor-management committees controlling apprentice training programs.

6.2. When a collective bargaining agreement includes a requirement that employees join a labor organization or pay a sum equivalent to its dues, the organization must accommodate an employee whose religious beliefs do not permit compliance by permitting him/her to donate a sum equivalent to dues to a charitable organization.

6.3. An employment agency that receives a job order containing an unlawful request based on religion will share responsibility with the employer placing the job order if the agency fills the order knowing that the religion specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of a bona fide occupational qualification.

§77-3-7. Exceptions.

7.1. W. Va. Code § 5-11-9 provides an exception to the prohibition of discrimination in employment when such discrimination is based on a bona fide occupational qualification (BFOQ). The Commission construes the BFOQ provision very narrowly and the burden of proving the existence of a BFOQ is on the employer.

7.2. When a certain religious orientation is reasonably necessary to the normal operation of a business or enterprise, an employer may require that applicants for the position in question ascribe to that religion.

7.3. The employment discrimination provisions in these rules do not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its religious and religion-related activities. This exemption does not protect

those activities of a religious institution that are for all practical purposes devoid of religious content and meaning.

§77-3-8. Public Accommodations.

8.1. These regulations apply to any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodations as defined by W. Va. Code § 5-11-2(j).

8.2. It shall be unlawful to refuse, withhold from, or deny, either directly or indirectly, to any individual because of religion, any of the accommodations, advantages, facilities, privileges, or services of such place of accommodation.

8.3. It shall be unlawful to refuse to make reasonable accommodations necessary to make any public accommodation available to persons otherwise excluded because of their religion, provided that such accommodations do not impose an undue hardship. The principles of reasonable accommodation and undue hardship, as set forth in §77-3-3, shall be used as guidelines in determining whether a person has been unlawfully discriminated against on the basis of religion by a place of public accommodations.

REPLY TO:
CIVIL RIGHTS DIVISION
812 QUARRIER STREET 5th FLOOR
CHARLESTON, WV 25301

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

16 November 1990

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

Re: Filing of agency approved emergency legislative rules pertaining to religious discrimination
Title 77, Series 3

Dear Mr. Hechler:

Enclosed please find a copy of the following information relative to the proposed emergency legislative rules which I submitting on behalf of the West Virginia Human Rights Commission:

1. The full text of the emergency rule as proposed by the Commission;
2. A brief summary of the content of the proposed rule;
3. A statement of the circumstances which require the rule; and
4. A fiscal note containing a statement of the economic impact of the rule on the Commission and the State or its residents.

I have enclosed an extra copy so that it may be stamped by your office and returned to me. If you have any questions, please do not hesitate to contact me.

Sincerely,

Mike Kelly Jr.

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MK/jm
Enclosure