WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

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

AMENDMENT TO AN EXISTING RULE: YES____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: §77-3-1

TITLE OF RULE BEING PROPOSED: Rules Regarding Religious Discrimination

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

5.20

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Religious Discrimination

Type of Rule: x Legislative _____ Interpretive _____ Procedural

Agency: West Virginia Human Rights Commission Address 1321 Plaza East, Room 104/106, Charleston, West Virginia 25301

1. Effect of Proposed Rule:	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ 0	$ 0	$ 0	$ 0	$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates: The rule will have no fiscal impact on the West Virginia Human Rights Commission.

3. Objectives of these rules: 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.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government. The economic impact of this rule will be minimal since no accommodation of religion need be made if it would require more than a de minimis cost to the State.

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

By helping to eliminate discrimination against them, the rule will have a favorable impact on members of minority religions, such as the Seventh-Day Adventists and Worldwide Church of God. There should be little, if any, impact on employers since no accommodation of religion is required if it would result in more than a de minimis cost to the employer.

C. Economic Impact on Citizens/Public at Large.

None

Date: November 16, 1990

Signature of Agency Head or Authorized Representative

DATE: 22 March 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA HUMAN RIGHTS COMMISSION

LEGISLATIVE RULE TITLE: RULES REGARDING RELIGIOUS DISCRIMINATION

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

2. a. Date filed in State Register with Notice of Hearing:
16 November 1990

b. What other notice, including advertising, did you give of the hearing?
Notice to all members, West Virginia State Bar Employment Committee

c. Date of hearing (s): 3 January 1991

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached x No comments received ____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
22 March 1991

f. Name and phone number of agency person to contact for additional information:
Mary Catherine Buchmleter
Civil Rights Division
812 Quarrier Street, 5th Floor
Charleston, WV 25301
348-0246

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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, provided that the employee or prospective employee has notified the employer or labor organization of his or her need for a religious accommodation or the employer or labor organization has otherwise obtained knowledge of the need for such an accommodation.

3.2.1. 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. The following subsections contain several suggested alternatives that may be used in attempting to accommodate the religious practices of employees or prospective employees. These suggested alternatives are not intended to be all inclusive as different factual circumstances surrounding the need for religious accommodation may require different solutions.

~~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.~~

3.4.1. One possible means of reasonable accommodation without undue hardship is through voluntary swapping or substitution where a voluntary substitute with substantially similar qualifications is available. The individual seeking accommodation is responsible to facilitate the securing of a voluntary substitute when he or she knows of someone with substantially similar qualifications who is willing to substitute or swap positions. The duty to reasonably accommodate the religious practices of employees or prospective employees requires that the employer or labor organization facilitate the securing of a voluntary substitute with substantially similar qualifications as the individual requiring accommodation. Employers and labor organizations may consider some of the following means to facilitate the securing of such a voluntary substitute:

3.4.1.A. To publicize policies regarding accommodations and voluntary substitution;

3.4.1.B. To promote an atmosphere in which substitutions are favorably regarded;

3.4.1.C. To provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed;

3.4.1.D. The obligation to accommodate requires that the 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.~~

3.4.2. Employers and labor organizations may also consider creating a flexible work schedule for those individuals requiring religious accommodation. Some of the areas in which flexibility in work scheduling might be utilized are as follows:

3.4.2.A. Flexible arrival and departure times;

3.4.2.B. Floating or optional holidays;

3.4.2.C. Flexible work breaks;

3.4.2.D. Use of lunch time in exchange for early departure;

3.4.2.E. Staggered work hours; and

3.4.2.F. Use of accumulated compensatory time for time lost due to an observance of religious practices.

~~3.4.3. A lateral transfer and change of job assignment.~~

3.4.3. When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer. As with voluntary substitutes or swaps, the availability of someone with substantially similar job-related qualifications may affect an employer's or labor organization's ability to allow such transfer or change in job assignment.

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

3.4.4. As a means of accommodating the religious practices of employees or prospective employees and when applicable, the Commission encourages employers and labor organizations to engage in discussions regarding exceptions to collective bargaining agreement provisions and any such discussions or agreement following such discussions may be considered as evidence of an attempt at reasonable accommodation.

3.5. A refusal to accommodate is justified only when an employer or labor organization, when applicable, can demonstrate that an undue hardship would in fact result from **each** available alternative method of accommodation. The employer or labor organization, when applicable, shall have the burden of showing that it took affirmative steps to attempt to reasonably accommodate an employee or prospective employees.

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. The employer or labor organization satisfies its duty to an employee or prospective employee once it offers all reasonable means of accommodation without undue hardship. An employee who fails to cooperate or accept accommodation may subject himself or herself to adverse or disciplinary action by the employer or labor organization where all reasonable accommodation without undue hardship has been offered.

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.

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 officers, 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 reasonably should have known of their occurrence, except that the employer is not responsible if the officer, agent or supervisory employee was acting outside the scope of his or her employment.

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~~ knew or reasonably should have known of the conduct or expressly or impliedly authorized or ratified such 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

5.3.2. 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~~ a particular available position is announced to an applicant, 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.

RECORD OF PUBLIC HEARING

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Rules Regarding Religious Discrimination
6 WVCSR §77-3-1

1. Date of Public Hearing: 3 January 1991

2. Attendance at Public Hearing: Four persons attended the public hearing:

Richard Perkins
Route 10, Box 112
Charleston, West Virginia 25312

Randall Murphy
Route 1, Box 165
Davisville, West Virginia 26142

Richard J. Lewis
154 Washington Circle
Hurricane, West Virginia 25526

Karen Sue Connor
Post Office Box 192
Belington, West Virginia 26250

3. Comments Received: Comments were received from Karen Sue Connor and the West Virginia Coal Association, copies of which are attached hereto.

4. Amendments Made as a Result of the Hearing or Comments: As a result of the comments received, and testimony taken, the following amendments were made:

3.2. Add the following new language:

. . . without undue hardship to the conduct of the employer's business, provided that the employee or prospective employee has notified the employer or labor organization of his or her need for a religious accommodation or the employer or

labor organization has otherwise obtained knowledge of the need for such an accommodation.

3.2.1. (Previously part of 3.2.)

3.4. Delete entire former section and replace with the following new language:

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

3.4. The following subsections contain several suggested alternatives that may be used in attempting to accommodate the religious practices of employees or prospective employees. These suggested alternatives are not intended to be all inclusive as different factual circumstances surrounding the need for religious accommodation may require different solutions.

~~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.~~

3.4.1. One possible means of reasonable accommodation without undue hardship is through voluntary swapping or substitution where a voluntary substitute with substantially similar qualifications is available. The individual seeking accommodation is responsible to facilitate the securing of a voluntary substitute when he or she knows of someone with substantially similar qualifications who is willing to substitute or swap positions. The duty to reasonably accommodate the religious practices of employees or prospective employees requires that the employer or labor organization facilitate the securing of a voluntary substitute with substantially similar qualifications as the individual requiring accommodation. Employers and labor organizations may consider some of the following means to facilitate the securing of such a voluntary substitute:

3.4.1.A. To publicize policies regarding accommodations and voluntary substitution;

3.4.1.B. To promote an atmosphere in which substitutions are favorably regarded;

3.4.1.C. To provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed;

3.4.1.D. The obligation to accommodate requires that the 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.~~

3.4.2. Employers and labor organizations may also consider creating a flexible work schedule for those individuals requiring religious accommodation. Some of the areas in which flexibility in work scheduling might be utilized are as follows:

3.4.2.A. Flexible arrival and departure times;

3.4.2.B. Floating or optional holidays;

3.4.2.C. Flexible work breaks;

3.4.2.D. Use of lunch time in exchange for early departure;

3.4.2.E. Staggered work hours; and

3.4.2.F. Use of accumulated compensatory time for time lost due to an observance of religious practices.

~~3.4.3. A lateral transfer and change of job assignment.~~

3.4.3. When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer. As with voluntary substitutes or swaps, the availability of someone with substantially similar job-related qualifications may affect an employer's or labor organization's ability to allow such transfer or change in job assignment.

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

3.4.4. As a means of accommodating the religious practices of employees or prospective employees and when applicable, the Commission encourages employers and labor organizations to engage in discussions regarding exceptions to collective bargaining agreement provisions and any such discussions or agreement following such discussions may be considered as evidence of an attempt at reasonable accommodation.

3.5. Add the following new language:

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

organization, when applicable, shall have the burden of showing that it took affirmative steps to attempt to reasonably accommodate an employee or prospective employees.

3.6. Add new language to end as follows:

When more than one means of accommodation . . . with respect to his/her employment opportunities. The employer or labor organization satisfies its duty to an employee or prospective employee once it offers all reasonable means of accommodation without undue hardship. An employee who fails to cooperate or accept accommodation may subject himself or herself to adverse or disciplinary action by the employer or labor organization where all reasonable accommodation without undue hardship has been offered.

4.2. Insert and add new language as follows:

An employer is responsible for its acts and those of its officers, agents . . . and regardless of whether the employer knew or reasonably should have known of their occurrence, except that the employer is not responsible if the officer, agent or supervisory employee was acting outside the scope of his or her employment.

4.3. Insert and add new language as follows:

With respect to persons. . . agents or supervisory employees, ~~knows~~ knew or reasonably should have known of the conduct or expressly or impliedly authorized or ratified such conduct. . . .

5.4. Insert new language as follows:

. . . 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~~ a particular available position is announced to an applicant, but before the applicant is hired, ...

5. Reason for Amendments:

A. Changes were made to Rule 3.2. to clarify the duty of an employee to notify the employer about the need for a religious accommodation.

B. Rule 3.2.1. was formerly part of Rule 3.2.

C. Changes were made to Rules 3.4., 3.4.1., 3.4.2., 3.4.3., and 3.4.4. to reflect that the listed possibilities of accommodation are options and suggestions and that other available means of accommodation may be used to meet the employer's burden.

D. Changes were made to Rule 3.5. to better reflect that the burden is on the employer or the labor organization to take affirmative steps to reasonably accommodate.

E. Changes were made to Rule 3.6. to reflect that an employee who refuses to accept an offer of reasonable accommodation may be subjected to disciplinary action within the ordinary course of business operation.

F. Changes were made to Rules 4.2. and 4.3. to reflect the standards of employer responsibility set forth in Paxton v. Crabtree, et al., No. 19615 (Slip Opinion filed 4 December 1990).

G. Changes were made to Rule 5.4. to reflect actual operation of the job market.

Dated this 22d day of March, 1991.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

M E M O R A N D U M

TO: Quewanncoii C. Stephens, Executive Director
West Virginia Human Rights Commission

Mike Kelly, Esquire
Deputy Attorney General, Civil Rights Division

FROM: West Virginia Coal Association

DATE: January 23, 1991

RE: Comments on Proposed Rules
Regarding Religious Discrimination

The West Virginia Coal Association, by counsel, respectfully submits the following comments to the West Virginia Human Rights Commission ("Commission") on the Proposed Rules Regarding Religious Discrimination.

DEFINITIONS

Rule 2.4.

The definition of "undue hardship" should include the following language: "or would require a variance from a bona fide seniority system when doing so would deny another employee his or her job or shift preference as guaranteed by the system." This additional language is consistent with case law and the definition of "undue hardship" contained in the Equal Employment Opportunity Commissions' Guidelines on

Discrimination Because of Religion ("Guidelines"), 29 C.F.R. Part 1605, § 1605.2(a)(2).

REASONABLE ACCOMMODATION

The West Virginia Coal Association believes it is important that the following language be added as the second sentence to Rule 3.2:

> After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices.

This additional language is necessary so that employees or prospective employees are aware that they first have the obligation to make the employer or any other covered entity aware of his or her needs for religious accommodation. See EEOC Guidelines, 29 C.F.R. §1605.2(c)(1).

With respect to the reasonable accommodation language set forth in Rule 3.4, et seq., the Coal Association believes that further clarification is required to assist employers and employees or applicants in understanding their obligations and rights under this chapter. Because of the many variables involved in determining whether reasonable accommodation is possible without undue hardship, the language of Rule 3.4 should be modified to inform the reader that the subsections following Rule 3.4 are suggested, non-exclusive alternatives

for accommodating religious practices. The Commission's proposed reasonable accommodation rules are presented in terms of a mandate rather than a suggestion, thereby denying any flexibility to employers and labor organizations in fashioning an accommodation to match a particular set of circumstances. While it is recognized that reasonable accommodation without undue hardship is indeed required by law, employers and labor organizations must necessarily be afforded some latitude in developing methods for complying with the reasonable accommodation requirements. Accordingly, the Coal Association recommends that the present language of Rule 3.4 be deleted and the following language substituted:

> The following subsections contain several suggested alternatives that may be used in attempting to accommodate the religious practices of employees or prospective employees. These suggested alternatives are not intended to be all inclusive as different factual circumstances surrounding the need for religious accommodation will require different solutions.

This proposed language is more akin to the EEOC Guidelines, § 1605.2(d) than the Commission's proposed rule and more accurately reflects judicial construction of Title VII religious accommodation requirements. See, e.g., Trans World Airlines v. Hardison, 432 U.S. 63 (1977). This suggested change is also in harmony with the Commission's proposed definition of "reasonable accommodation" at Rule 2.3 which states that determinations will be made "on a case-by-case basis."

Correspondingly, subsections 3.4.1 - 4 should also be modified to more definitively set forth that the enumerated alternatives for accommodation are suggested. The Coal Association proposes, therefore, that Subrule 3.4.1 should be changed to the following:

> One possible means of reasonable accommodation without undue hardship is through voluntarily swapping or substitution where a voluntary substitute with substantially similar qualifications is available. The individual seeking accommodation is responsible to facilitate the securing of a voluntary substitute when he or she knows of someone with substantially similar qualifications who is willing to substitute or swap positions. The duty to reasonably accommodate the religious practices of employees or prospective employees requires that the employer or labor organization facilitate the securing of a voluntary substitute with substantially similar qualifications as the individual requiring accommodation. Employers and labor organizations may consider some of the following means to facilitate the securing of such a voluntary substitute: (a) to publicize policies regarding accommodations and voluntary substitution; (b) to promote an atmosphere in which substitutions are favorably regarded; (c) to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

This modified language is also more in line with EEOC Guidelines, § 1605.2(d)(i) and case law than the Commission's proposed rule.

Consistent with EEOC Guidelines, §1605.2(d)(ii), Subrule 3.4.2 should also be changed to the following:

> Employers and labor organizations may also consider creating a flexible work schedule for those individuals requiring religious accommodation. Some of the areas in which flexibility in work scheduling might be utilized are as follows: (a) flexible arrival and departure times; (b) floating or optional holidays; (c) flexible work breaks; (d) use of lunch time in exchange for early departure; (e) staggered work hours; and (f) use of accumulated compensatory time for time lost due to an observance of religious practices.

In addition, the Coal Association proposes the following substituted language for Subrule 3.4.3:

> When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer. As with voluntary substitutes or swaps, the availability of someone with substantially similar job-related qualifications may affect any employer's or labor organization's ability to allow such transfer or change in job assignment.

The Coal Association also urges that Subrule 3.4.4 be substantially modified. First of all, the present language places the entire burden on the employer to initiate discussions with labor organizations regarding exceptions to a collective bargaining agreement. This policy is not consistent

with the principles set forth in EEOC Guidelines, § 1605.2(e)(2) and places an unfair burden on the employer. In addition, the current proposed subrule suggests that if the workforce is organized the employer must negotiate with the labor union on reasonable accommodation. The Coal Association believes that commanding such discussions would convert reasonable accommodation into a mandatory bargaining subject and such a requirement may run afoul of federal labor law principles. Hence, the Coal Association requests that the following language be substituted for Subrule 3.4.4:

> As a means of accommodating the religious practices of employees or prospective employees and when applicable, the Commission encourages employers and labor organizations to engage in discussions regarding exceptions to collective bargaining agreement provisions and any such discussions or agreement following such discussions may be considered as evidence of an attempt at reasonable accommodation.

To more accurately reflect the language of the EEOC Guidelines, Rule 3.5 should include "or labor organization" after "employer." See EEOC Guidelines, 29 C.F.R. § 1605.2(c)(i). The Coal Association also recommends that following Rule 3.6, another section be inserted to clarify employee obligations regarding reasonable accommodation:

> The employer or labor organization satisfies its duty to an employee or prospective employee once it offers all

> reasonable means of accommodation without undue hardship. An employee who fails to cooperate or accept accommodation may subject himself or herself to adverse or disciplinary action by the employer or labor organization where all reasonable accommodation without undue hardship has been offered.

Such a provision explains that employers and labor organizations are protected in those instances where after all means of reasonable accommodation have been offered and the employee's refusal to cooperate in accommodation efforts make accommodation impossible. See EEOC Decision, No. 81-28.

SELECTION PRACTICES

The Coal Association recommends that the third sentence in Rule 5.4 should be modified to eliminate some of the ambiguity contained therein. In that connection, the phrase "after a position is offered," should be deleted and replaced with "after a particular available position is announced to an applicant..." This modified language more accurately depicts the actual interview process than the current proposed language. Moreover, "after a position is offered" signifies that a hiring decision in the form of an offer of employment has been effected. This is obviously not the intent of this provision as evidenced by the subsequent language; and in its present form, this sentence creates some confusion.

RELIGIOUS HARASSMENT

For several reasons, the Coal Association submits that the Commission should reconsider promulgation of any rules on religious harassment. First of all, the Coal Association questions whether it is necessary to create a set of regulations dealing exclusively with religious harassment because adequate protection from discrimination on the basis of religion is already afforded by the Act and other rules. Notably, the EEOC Guidelines do not contain any such proscription for religious harassment; and to our knowledge, there has been no challenge that the Guidelines are ineffective or that additional language on religious harassment is needed to address the issue. The absence of any such provisions in the EEOC Guidelines indicates that religious harassment is not a problem that exists on the scale of racial or sexual harassment or even harassment because of natural origin. The Coal Association also believes that the charge history before the Human Rights Commission supports the notion that claims of religious harassment are virtually nonexistent.

As the Commission obviously realizes, there is considerable value in having consistency with Human Rights Commission rules and EEOC guidelines. In that connection, because the Commission is a 706 deferral agency, there is a significant need for uniformity in the application of anti-discrimination laws. Moreover, federal case law provides

important precedent in employment discrimination cases, and the West Virginia Supreme Court has clearly indicated its preference for reliance upon Title VII cases in deciding cases under the Human Rights Act. Accordingly, unless there is an extraordinary requirement for West Virginia to independently focus on religious harassment, the Coal Association urges that these proposed rules are superfluous and should be deleted.

Furthermore, unlike other anti-harassment regulations, an attempt to redress religious harassment comes much closer to abridging constitutional rights of free speech and religion. Prohibiting certain conduct that may be deemed by one individual as religious harassment could arguably interfere with another person's protected expression of a religious belief. In that connection, the Coal Association believes that the Commission will encounter monumental problems in attempting to distinguish between the exercise of protected rights and conduct which may constitute religious harassment under these proposed rules.

To illustrate this definitional problem, there could be a situation where one person with strong religious convictions is offended or intimidated by an atheist who openly expresses his or her views on religion. It is also conceivable that these rules could be converted into "anti-profanity" regulations. Does the Commission really want to become involved in policing this type of conduct?

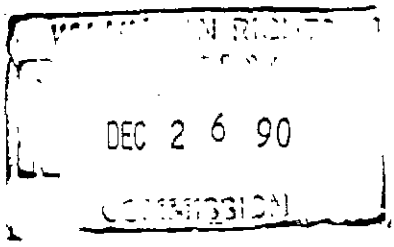
In sum, the Coal Association believes that the beneficient purposes of the West Virginia Human Rights Act will necessarily be diluted if the Commission attempts to prohibit or even restrain the voicing of religious beliefs in the workplace. Accordingly, the Coal Association recommends that Section 77-3-4 be rescinded in its entirety.

Respectfully Submitted,

WEST VIRGINIA COAL ASSOCIATION
By Counsel

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P. O. Box 192
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December 24, 1990

Mr. Norman Lindell, Assistant Director
W. Va. Human Rights Commission
1321 Plaza East, Room 104/106
Charleston, W. Va. 25301

Dear Sir:

Re: Comments on New Rule 77-3-1

I am a Seventh-Day Adventist and have been for 25 years.

I have had some good experiences and some not so good over the years. Perhaps the most hurtful experience came when my daughter age 9 was refused an accommodation by the Barbour County Board of Education in order to allow her to participate in a County Spelling Bee. The bee was being held on a Friday evening at 7:00 p.m. after our Sabbath had already begun. I was told it was inconvenient - that pronouncers and judges had already been gotten. A total of 25 minutes time had been spent at a rate of $10. per hour for a total cost of $4.15. The coordinator didn't want to undo the work and hurt the feelings of the person doing the work. It didn't matter that the feelings of a 9 year old would be hurt if they didn't make the change.

In another instance in Maryland, I had a job with C & P Telephone Co. until I said I was Seventh-Day Adventist. They told me they didn't work on Saturday anyway but asked if an emergency came up would I come in and work on Saturday. When I said no, they said they were sorry but they needed someone who could work on Saturday if and when they ever needed them to.

I feel that these new rules will be of valuable assistance to persons of various religous faiths and I heartily encourage your acceptance.

Sincerely,

Karen Sue Conner

Mrs. Karen Sue Conner

KSC:

cc.

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812 Quarrier Street - 5th Floor
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22 March 1991

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Chairman, Legislative Rule-
Making Review Committee
State Capitol, M-436
Charleston, West Virginia 25305

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

Dear Sir/Ms.:

Enclosed please find fifteen (15) copies of the following documents relative to the above-referenced emergency rule, which rule was previously filed with the Legislative Rule-Making Review Committee on 16 November 1990:

1. Notice of Agency Approval of a Proposed Rule and Filing with the Legislative Rule-Making Review Committee;
2. The full text of the agency approved rule, as amended;
3. Record of public hearing; and
4. Comments received from the West Virginia Coal Association and Karen Sue Connor

Please let me know if we have failed to attach any required documents.

Sincerely,

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MK/jm
Enclosures
cc: The Hon. Ken Hechler
Secretary of State