WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

RULE TYPE: Legislative ; 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: 5

TITLE OF RULE BEING PROPOSED: Rules Regarding Exemption of Private Clubs

DATE OF PUBLIC HEARING: 3 January 1991 TIME: 11:00 a.m.

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

COMMENTS LIMITED TO: ORAL___, WRITTEN___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Norman Lindell
Assistant Director
West Virginia Human
Rights Commission
1321 Plaza East
Room 104/106
Charleston, WV 25301

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Exemption of Private Clubs

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 employees, potential patrons, and members of private clubs in understanding their rights, obligations, and duties under the Human Rights Act and to set forth as clearly as possible the criteria a club must meet in order to be considered exempt from the Human Rights Act.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

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

None. Private clubs which are not "truly" private are already exposed to liability under state and federal civil rights statutes. This rule makes clubs aware of, but does not expand, that liability.

C. Economic Impact on Citizens/Public at Large.

None

Date: November 16, 1990

Signature of Agency Head or Authorized Representative

SUMMARY OF PROPOSAL

The attached proposed rule clarifies which private clubs are eligible for the exemption from coverage in the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. It faithfully reflects the standards developed by the federal courts in interpreting similar statutes.

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TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION

SERIES 5
RULES REGARDING EXEMPTION OF PRIVATE CLUBS

§77-5-1. 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 criteria for interpreting the Act's exemption of private clubs from the operation of its provisions 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. They are based on decisions of the United States Supreme Court and various federal circuit and district courts, and an interpretation of the HRA. It is proper for the Commission to look for guidance to federal court interpretations of similar federal statutes when interpreting the HRA. Human Rights Commission v. United Transportation Union, et al., 280 S.E.2d 653 (1981).

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.

§77-5-2. Exemption of Truly Private Clubs.

2.1. The exemption afforded private clubs by the West Virginia Human Rights Act, W. Va. Code §§ 5-11-3(d) & (j) and 5-11-19, shall be valid as a defense to a complaint filed under the HRA only if the invoking club is truly private and is not in fact open to the public.

2.2. In determining whether a respondent is a truly private club which is not in fact open to the public, the Commission shall examine the following factors:

2.2.1. Whether the respondent is a club in the ordinary sense of the word and was formed because of common associational interests among the members;

2.2.2. Whether it carefully screens applicants for membership and selects new members with reference to the common intimacy of the association;

2.2.3. Whether it limits its membership to a number small enough to allow full membership participation and to ensure that all members share the common associational bond;

2.2.4. Whether it limits the use of its facilities and services strictly to members and bona fide guests of members;

2.2.5. Whether it is controlled by the membership either in the form of a general meeting or some other organizational form;

2.2.6. Whether publicity is directed solely to members for their information and guidance;

2.2.7. Whether it is nonprofit and operated solely for the benefit of the members.

§77-5-3. Additional Indicators.

3.1. In addition to the factors set forth in section 2.2. above, the Commission shall consider the following indicators in determining whether a respondent qualifies for a private club exemption:

3.1.1. It is an indicator that a club is not a truly private club not in fact open to the public if it provides regular meal service and regularly receives payment for dues, fees, use of space, facilities services, meals, or beverages directly or indirectly from or on behalf of nonmembers;

3.1.2. It is an indicator that a club is not a truly private club not in fact open to the public if it carries on in any significant degree functions which are considered commercial in nature, such as if it provides a forum where business deals are often made and personal contacts valuable for business purposes, employment, and professional advancement are formed.

3.2. An alleged private club exemption must be examined in light of the HRA's clear purpose of protecting only the genuine privacy of private clubs whose membership is genuinely selective.

3.3. An alleged private club exemption must be examined in light of the remedial purpose of the HRA to eliminate discrimination.

§77-5-4. Burden of Proof.

4.1. The respondent shall bear the burden of proving that it is a truly private club not in fact open to the public and that it qualifies for a private club exemption.

§77-5-5. Preservation of Right to Expressive Association.

5.1. At no time shall the Commission interfere in the activities of an alleged private club or subject club opportunities to scrutiny beyond what is necessary in good faith to enforce the HRA.

5.2. The Commission shall not direct the manner in which alleged private clubs conduct their activities or select their members except insofar as is necessary to ensure that an alleged club does not automatically exclude persons from consideration for membership, or enjoyment of club accommodations and facilities, and the advantages and privileges of membership on account of unlawful and invidious discrimination.

5.3. The burden shall be on the purported private club to demonstrate that compliance with the HRA imposes a serious burden on its members' freedom of expressive association.

§77-5-6. Scope of Coverage.

6.1. This rule shall apply to private clubs in their capacities as an employer as well as an alleged place of public accommodation.