WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Dec 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: 5

TITLE OF RULE BEING FILED AS AN EMERGENCY: Rules Regarding Exemption of Private Clubs

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.

2.90

DATE: 16 November 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Human Rights Commission

EMERGENCY RULE TITLE: Rules Regarding Exemption of Private Clubs

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 EXEMPTION OF PRIVATE CLUBS
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 against alleged private clubs.

B. The exemptions afforded private clubs by similar federal statutes have been held to apply to only "truly" private clubs. The West Virginia Human Rights Act has been held by at least one state circuit court to likewise exempt only "truly" private clubs. The vast majority of private clubs are unaware of the narrowness of this exemption.

C. The proposed rule faithfully reflects the current body of federal law regarding the exemption of only "truly" private clubs.

D. 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.

E. Unless filed as an emergency rule, affected parties will continue to make critical legal decisions without benefit of the concrete guidelines offered by this rule and without knowledge as to whether or not their acts are protected or prohibited by, or exempt from, the Human Rights Act.

F. Failure to file the rule as an emergency rule would do substantial harm to the public interest by allowing private clubs, as well as their employees, members and potential patrons, to falsely believe that a club is exempt from coverage of the Human Rights Act when, in fact, it is not a "truly" private club.

RULES REGARDING EXEMPTION OF PRIVATE CLUBS
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Attachment to Form #7

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

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.

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 exemption of private clubs
Title 77, Series 5

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

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MK/jm
Enclosure