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November 7, 1990

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Human Rights Commission

RULE: New Rule, Series 5, Exemption of Private Clubs

DATE FILED AS AN EMERGENCY RULE: November 7, 1990

DECISION NO. 51-90

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

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DECISION EMERGENCY RULE DECISION
(ERD 51-90)

AGENCY: Human Rights Commission
RULE: New Rule, Series 5, Exemption of Private Clubs
FILED AS AN EMERGENCY RULE: November 16, 1990

par. 1 The Human Rights Commission (Commission) has filed the above new rule as an emergency.

par. 2 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].

par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Commission has filed this emergency rule with supporting documents with the Secretary of State on November 16, 1990, and with the LRMRC on November 16, 1990.

par. 7 It is the determination of the Secretary of State that the Commission has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §5-11-8(h) reads:

(h) To do all other acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by the provisions of this article, including the promulgation of legislative rules in accordance with the provisions of §29A-3-1 et seq. of this code, implementing the powers and authority hereby vested in the commission.

par. 9 It is the determination of the Secretary of State that the Commission has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Commission are as follows:

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 12 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 all persons 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.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in 29A-3-15(g) . . ."to prevent substantial harm to public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 51-90 or ERD 51-90 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Human Rights Commission, the Attorney General and the Legislative Rule Making Review Committee.

Ken Hechler

KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Dec. 7, 1990
ADMINISTRATIVE LAW DIVISION

Entered_____