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: 77-5-1

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

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.

2.50

DATE: 22 March 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA HUMAN RIGHTS COMMISSION

LEGISLATIVE RULE TITLE: RULES REGARDING EXEMPTION OF PRIVATE CLUBS

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 _____ No comments received x

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 Buchmelter
~~Civil Rights Division~~
812 Quarrier Street, 5th Floor
~~Charleston, WV 25301~~
348-0246

1. 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 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 guidelines 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 S 5-11-3(d) & (j) and § 5-11-19, may be invoked as a defense to a complaint filed under the HRA only by clubs which are truly private and which are 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.

RECORD OF PUBLIC HEARING

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Rules Regarding Exemption of Private Clubs
6 WVCSR §77-5-1

1. Date of Public Hearing: 3 January 1991

2. Attendance at Public Hearing: No members of the public attended the hearing.

3. Comments Received: No comments were received.

4. Amendments Made as a Result of Hearing or Comments: None.

Dated this 22nd day of March, 1991.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

Antitrust & Civil Rights Divisions
812 Quarrier Street - 5th Floor
Charleston, WV 25301
(304) 348-0246

MARIO J. PALUMBO
ATTORNEY GENERAL

RICHARD L. GOTTLIEB
CHIEF DEPUTY ATTORNEY GENERAL

STATE OF WEST VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

CHARLESTON 25305

FAX - (304) 348-0184

Consumer Protection Division
812 Quarrier Street - 6th Floor
Charleston, WV 25301
(304) 348-8986
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(800) 368-8808

Preneed-Funeral
812 Quarrier Street - 4th Floor
Charleston, WV 25301
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22 March 1991

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

FILED
1991 MAR 22 AM 11:08
OFFICE OF THE SECRETARY OF STATE

Re: Filing of agency approved emergency legislative rule pertaining to exemption of private clubs
Title 77, Series 5

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, which is identical to the emergency rule; and
3. Record of public hearing.

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

Sincerely,

Mike Kelly

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

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