

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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NOTICE OF AN EMERGENCY RULE

AGENCY: Department of Administration: Purchasing Division TITLE NUMBER: 148

CITE AUTHORITY: West Virginia Code Section 9-8-7

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: Five (5)

TITLE OF RULE BEING FILED AS AN EMERGENCY: Availability Of State Surplus
Buildings And Equipment To Charity Food Bank

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

Use Additional Sheets If Necessary.

C. W. Polun



STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION

State Capitol
Charleston, WV 25305

Gaston Caperton
Governor

Chuck Polan
Secretary

June 27, 1990

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WEST VIRGINIA
SECRET

Honorable Ken Hechler
Secretary of State
Capitol Complex
Charleston, West Virginia 25305

Re: Rules

Dear Ken:

Approval is hereby given for filing of Emergency Rules of the Department of Administration, Division of Purchasing, entitled Availability of State Surplus Buildings and Equipment to Charity Food Banks, as enclosed, in accordance with West Virginia Code Section 29A-3-1 et seq.

Sincerely,

Chuck Polan
Secretary

CP/wm

FILED

FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY: 11 2 18

This Emergency Rule is needed as West Virginia Code Section 9-8-7 became effective July 1, 1989 and no rules were promulgated to effectuate the provision. As a result of having no regulations, charity food banks have been unable to obtain available State surplus buildings and equipment that will enable the charity food banks to better solicit, store and redistribute food products to charitable organizations and individuals for the purpose of feeding needy families and individuals. Therefore, failure to grant the emergency rule may result in substantial harm to the public interest pursuant to West Virginia Code Section 29A-3-15.

FILED

JUN 26 1990

DATE: June 26,1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Department of Administration:Purchasing Division

EMERGENCY RULE TITLE:Availability Of State Surplus Buildings And Equipment To
Charity Food Bank

1. Date of filing: June 26,1990

2. Statutory authority for promulgating the emergency
rule:West Virginia Code Section 9-8-7

3. Date of filing of proposed legislative rule: June 26,1990

4. Does the emergency rule adopt new language or does it
amend or repeal a current legislative rule?

No

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

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.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See attached

FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY

This Emergency Rule is needed as West Virginia Code Section 9-8-7 became effective July 1, 1989 and no rules were promulgated to effectuate the provision. As a result of having no regulations, charity food banks have been unable to obtain available State surplus buildings and equipment that will enable the charity food banks to better solicit, store and redistribute food products to charitable organizations and individuals for the purpose of feeding needy families and individuals. Therefore, failure to grant the emergency rule may result in substantial harm to the public interest pursuant to West Virginia Code Section 29A-3-15.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Availability Of State Surplus Buildings And Equipment To Charity
Food Bank

Type of Rule: X Legislative Interpretive Procedural

Department of Administration

Agency Purchasing Division Address Capitol Complex E-119

Charleston, WV 25305

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

2. Explanation of above estimates: No additional costs are anticipated by implementing this rule.

3. Objectives of these rules: To permit charity food banks to obtain available State surplus buildings and equipment in accordance with the provisions of West Virginia Code Section 9-8-7.

TITLE 148
LEGISLATIVE RULES
DEPARTMENT OF ADMINISTRATION
Purchasing Division

SERIES 5
AVAILABILITY OF STATE SURPLUS BUILDINGS AND EQUIPMENT TO CHARITY
FOOD BANKS

Section 148-5-1. General.

1.1 Scope.--These legislative rules establish requirements for providing available state surplus buildings and equipment necessary for the operation of a charity food banks for use without charge.

1.2 Authority.--West Virginia Code Section 9-8-7.

1.3 Filing Date.--

1.4 Effective Date.--

Section 148-5-2. Definitions.

As used in these rules, all terms have the same meaning as provided in the Charity Food Banks Act, article eight, chapter nine of the West Virginia Code, and as provided in the Department of Administration Act, chapter five-a of the West Virginia Code.

Section 148-5-3. Charity food bank eligibility.

To be eligible to use without charge available state surplus buildings or equipment, a charity food bank must meet the minimum standards established in section 6, article 8, chapter 9 of the West Virginia Code and provide a copy of the current contract with the Division of Human Services of the Department of Health and Human Resources under the Hunger Prevention Act of 1985, P. L. 100-435, to the Director of the Purchasing Division of the Department of Administration.

Section 148-5-4. State surplus buildings.

(a) Upon request from an eligible charity food bank to use a surplus state building, the Director of Purchasing shall determine whether or not the building is vacant and available for such use.

(b) If the building is vacant and available, the charity food bank shall submit a letter of intent to the Director of Purchasing with a copy of the contract between the charity food bank and the Division of Human Services of the Department of Health and Human Resources. The letter of intent shall be signed and dated by an authorized representative of the charity food bank.

The letter of intent shall provide the following:

(i) Identification of the applicant, complete address and name, title and telephone number of the authorized representative signing the letter of intent;

(ii) Description of the building requested, including location and owner; and

(iii) Details on the planned utilization of the building.

The Director of Purchasing shall determine whether the information provided in a letter of intent is sufficient.

(c) In the event the building is vacant and available for use by the requesting charity food bank and the letter of intent has been determined sufficient, the Director of Purchasing shall cause a lease between the owner of the building and the charity food bank to be prepared and executed. The lease shall contain a term consistent with the contract between the charity food bank and the Division of Human Services of the Department of Health and Human Resources and such other terms and conditions as deemed reasonable and prudent by the Director of Purchasing, in a form similar to attached Exhibit A.

Section 148-5-5. State surplus equipment.

(a) Upon request from an eligible charity food bank to use surplus state equipment, the Director of Purchasing shall determine whether or not such equipment is available for such use.

(b) If the surplus equipment is available, the charity food bank shall submit a letter of intent to the Director of Purchasing with a copy of the contract between the charity food bank and the Division of Human Services of the Department of Health and Human Resources. The letter of intent shall be signed and dated by an authorized representative of the charity food bank.

The letter of intent shall provide the following:

(i) Identification of the applicant, complete address and name, title and telephone number of the authorized representative signing the letter of intent;

(ii) Description of the equipment requested, including the type, model, serial number, location and owner;

(iii) Details on the planned utilization of the equipment, including location; and

(iv) In the event the equipment requires trained operation, listing of the persons who will operate the equipment and their level of training.

The Director of Purchasing shall determine whether such letter of intent is sufficient.

(c) In the event the equipment is available for use by the requesting charity food bank and the letter of intent has been determined sufficient, the Director of Purchasing shall cause a lease between the owner of the equipment and the charity food bank to be prepared and executed. The lease shall contain a term consistent with the contract between the charity food bank and the Division of Human Services of the Department of Health and Human Resources and such other terms and conditions as deemed reasonable and prudent by the Director of Purchasing, in a form similar to attached Exhibit B.

Section 148-5-6. Restrictions.

The Purchasing Division of the Department of Administration may place such restrictions on the use and disposition of any building or equipment obtained in accordance with these regulations in order to protect the State and to comply with any and all federal, state and local laws and regulations pertaining to such use and disposition.

EXHIBIT A

STATE OF WEST VIRGINIA

CONTRACT OF LEASE

THIS CONTRACT OF LEASE, Made this _____ day of _____,
19____, by and between _____, Lessor, and
_____, Lessee.

WHEREAS, Lessee, as a charity food bank, is a nonprofit organization that solicits, stores and redistributes food products to charitable organizations and individuals for the purpose of feeding needy families and individuals; and

WHEREAS, Lessee desires to use without charge the available surplus state building(s) herein leased; and

WHEREAS, Lessor desires to assist the charity food bank by leasing the available surplus state building(s) without charge.

NOW, THEREFORE, THIS CONTRACT OF LEASE WITNESSETH:

That for and in consideration of the full and complete performance of the covenants, terms, conditions hereinafter set forth, Lessor leases to Lessee, for use by Lessee, the following described premises:

The parties covenant and bind themselves as follows:

1. USE

Lessee shall use the premises for _____ only, and Lessee shall not use the premises for any purpose other than the purpose stated in this section unless Lessor gives its advance written consent to another use. Lessee covenants that it will not permit the premises to be used by any other person or entity unless Lessor gives its advance written consent. Lessee shall not create a nuisance or use the premises for any immoral purpose.

2. TERM

The term of this lease, subject to the provisions hereof, shall be for _____ (____) months, beginning on the _____ day of _____, 19____, and ending at midnight on the _____ day of _____, 19____. This lease shall be considered renewed for each ensuing fiscal year during the term hereof unless sooner terminated in accordance with the provisions of this lease. This lease may be renewed upon mutual, written agreement of the parties.

3. WARRANTIES AND COMPLIANCE

Lessor makes no warranty as to the suitability of the premises, nor that the premises comply with applicable laws, ordinances, rules or regulations of governmental or other regulatory authorities. Lessee accepts the premises in the condition that exists at the beginning of this lease and agrees to comply with all applicable laws, ordinances, rules and regulations of governmental or other regulatory authorities during the term of

this lease or any renewal.

4. RENT

In consideration of providing food products to charitable organizations and individuals for needy families and individuals, the parties agree that Lessee shall be permitted to use the premises for the purpose set forth in section one without charge, but that Lessee shall be liable for any and all other costs associated with this lease.

5. UTILITIES AND SERVICES

Lessee shall provide all utilities or other services of every kind to the premises during the term of this lease and any renewals. Lessee covenants that Lessor shall not be responsible for any costs associated with such utilities and services.

6. MAINTENANCE

Lessee shall maintain the premises, including the structure of the premises, both interior and exterior and the electrical, heating, ventilation, air conditioning and plumbing fixtures and equipment in the same condition as when this lease commenced. Lessee shall be responsible for any damage to the premises herein leased caused by Lessee, its employees, agents and invitees.

7. ALTERATIONS

Lessee shall not make alterations without the prior written

consent of Lessor. Alterations shall include, but not be limited to, alterations, additions, substitutions, installations, changes and improvements. Lessor's consent shall not be unreasonably withheld or unduly delayed for nonstructural interior alterations to the premises that do not adversely affect the appearance, value or structural strength of the building.

Alterations made under this section shall be at the expense of Lessee. The alterations shall belong to the Lessor at the end of this lease and any renewals unless otherwise agreed in writing by the parties.

8. INSURANCE

Lessee shall keep Lessor's and Lessee's personal property and fixtures insured against damage and destruction, and shall maintain comprehensive general liability insurance, including public liability and property damage, with a combined single limit of liability of at least one million dollars (\$1,000,000) for personal injuries or deaths of persons occurring in or about the premises. Lessee shall provide copies of certificates evidencing the required insurance upon request of Lessor.

9. DAMAGE OR DESTRUCTION TO PREMISES

In the event the premises herein leased are destroyed or damaged by fire, natural elements, or other cause to such an extent that continued occupancy by Lessee of any portion of the premises would be impractical, Lessee shall give immediate notice thereof to

Lessor in writing and this lease shall terminate, and Lessee shall deliver possession of the premises to Lessor. If only a part of the premises shall be rendered untenable, leaving the remainder suitable for Lessee's usage, Lessee shall notify Lessor in writing. Lessor shall have five days from receipt of such notice to decide whether or not to repair the premises. Should Lessor decide not to repair the premises, this lease shall terminate and the Lessee shall deliver possession of the premises to Lessor.

In the event of such damage or destruction, Lessee shall repair, replace or restore the premises to as good a condition as existed on the commencement of this lease, reasonable wear and tear excepted, unless otherwise agreed in writing, signed by the parties.

Notwithstanding anything contained in this lease, Lessor shall not be obligated to repair, replace or restore any of Lessee's equipment, furniture, other property or alterations damaged or destroyed during the term of this lease, Lessor reserves all rights to damages paid because of any partial or entire taking, damage or destruction to the premises, except for equipment or other personal property of Lessee, until the premises are repaired, replaced or restored in accordance with this section.

10. INDEMNIFICATION

Lessee agrees to indemnify, defend and hold Lessor harmless from claims for personal injury, death or property damage and for incidents occurring in or about the premises or building(s).

11. TRANSFER OR ASSIGNMENT OF LEASE

Lessee shall not transfer, mortgage, encumber, assign or sublease all or part of the premises or this lease without the prior written consent of Lessor and under such conditions as shall be established by Lessor.

12. NEGLECT OF PREMISES

Lessee covenants that Tenant shall not commit waste on the premises herein leased, and that the premises will be returned to Lessor at the termination of this lease in substantially as good condition as at the commencement thereof, damages from natural elements, reasonable wear and tear excepted.

13. QUIET POSSESSION

Lessor warrants that it owns the premises free and clear of all encumbrances, except _____

If Lessee is not in default and subject to the provisions of this lease, Lessor further warrants that Lessee's peaceful and quiet enjoyment of the premises shall not be disturbed by anyone.

14. DEFAULT BY LESSEE

Each of the following shall constitute an event of default by Lessee:

- (a) default in any of the covenants or agreements

contained herein;

(b) abandons or vacates the premises prior to the end of the lease term or any renewal;

(c) files bankruptcy or is adjudicated bankrupt or insolvent; or

(d) the contract between the Lessee and the Division of Human Services of the Department of Health and Human Resources is terminated.

In the event of default by Lessee, Lessor may do any one or more of the following:

(a) terminate this lease, at which time Lessee shall surrender the premises to Lessor;

(b) enter and take possession of the premises without process of law, with or without terminating this lease;

(c) alter locks or other security devices at the premises; and

(d) take any other action under the law.

Lessee shall remain liable for any expenses incurred by Lessor in connection with Lessee's default and for any other liabilities accruing to Lessee in connection with this lease.

15. PROVISIONS FOR IMMEDIATE TERMINATION

The parties agree that this lease shall be considered canceled if:

(a) the premises or a portion thereof is sold or transferred, voluntarily or involuntarily;

(b) the West Virginia Legislature or the federal government should subsequently fail to appropriate sufficient funds therefore, or should otherwise act to impair this lease or cause it to be canceled; or

(c) in the event it is unlawful to continue this lease.

In the event of a termination in accordance with this section, the Lessee shall immediately redeliver possession of the premises to the Lessor. Upon such termination, the parties shall be relieved from any and all obligations hereunder or concerning the premises except for the responsibilities or liabilities as may have accrued prior to the latter of termination or redelivery.

16. CANCELLATION OF LEASE

Either party shall have the right to cancel this lease, without further obligation, except as may have accrued to the date of surrender, upon giving thirty (30) days written notice to the other party.

17. SURRENDER OF PREMISES

Upon termination of this lease, including any renewal, Lessee shall surrender the premises to Lessor in the same condition that the premises were on the beginning date of this lease, except for:

- (a) ordinary wear and tear;
- (b) damage arising from any cause not required to be repaired or replaced by Lessee;
- (c) condemnation;

(d) alterations as permitted by Lessor, unless consent was conditioned on their removal.

18. REMOVAL OF MACHINERY AND EQUIPMENT

On surrender, Lessee shall remove from the premises all personal property, machinery and equipment installed by Lessee, or placed upon the premises herein leased incident to Lessee's business, whether annexed to the freehold or not, and the premises restored to as good condition as exited prior to the installation of said personal property, machinery and equipment, reasonable wear and tear excepted. Any items not removed by Lessee as required herein shall be considered abandoned. Lessor may dispose of abandoned items as Lessor chooses and bill Lessee for the cost of their disposal, less any revenues received by Lessor for their disposal.

19. LIENS

Lessee shall not permit any liens or claims to be placed or levied against the premises and shall immediately discharge same in the event a lien or claim is placed against the premises because of Lessee, its employees, agents or invitees.

20. RIGHT TO ENTER

Lessor, its agents and employees may enter the premises at reasonable times, and at any time in an emergency, without charge or liability to:

- (a) make repairs or alterations to the premises;
- (b) comply with required laws, rules or regulations;
- (c) inspect the premises;
- (d) show the premises to prospective purchasers, lessees, or others;
- (e) post notices; and
- (f) remove any alterations made by Lessee in violation of section seven of this lease.

21. FORCE MAJEURE

If by reason of force majeure, Lessor or Lessee is unable, in whole or in part, to carry out its obligation under this lease, Lessor or Lessee, as the case may be, shall not be deemed in default during the continuation of such inability. The term force majeure as used herein shall mean, without limitation, the following: acts of God; strikes; lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any kind of the government of the United States of America or the State of West Virginia or any of their departments, agencies or officials, or any civil or military authority; insurrections; riots; landslides; earthquakes; fires; storms; droughts; floods; or explosions.

22. NOTICES

All notices given under this lease shall be in writing and mailed to the other party, directed to the last-known address of

the party to be notified, and deposited in the post office. Any such notice shall be deemed to have been received five days subsequent to mailing. Notices shall be directed as follows:

To the Lessor:

To the Lessee:

Either party may change these persons and/or addresses by giving notice as provided above.

23. PARTIES BOUND

The covenants and conditions herein contained shall apply to and bind the heirs, successors, executors, administrators and assigns of all of the parties hereto.

24. TIME OF THE ESSENCE

Time is of the essence in this lease, and of each and every covenant, term, condition and provision hereof.

25. HEADINGS

The headings to the various sections of this lease have been inserted for reference only and shall not in any manner be construed as modifying, amending or affecting in any way the express terms and provisions hereof.

26. SEVERABILITY

Any provisions of this lease found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of this lease.

27. WAIVER

The failure of either party to exercise any of its rights shall not be construed a waiver of those rights. A party may waive only those rights specified in writing and signed by the party waiving its rights.

28. MODIFICATIONS

No terms, covenant or condition contained herein shall be modified, amended or altered, except in writing, signed by both parties.

29. GOVERNING LAW

This lease shall be governed by the laws of the State of West Virginia.

30. SURVIVAL OF REMEDIES

The remedies of the parties shall survive the ending of this lease and any renewal when the ending is caused by the default of the other party.

31. EXECUTION IN COUNTERPARTS

This Lease may be executed in several counterparts. The parties hereto agree that ___ originals of this lease have been executed.

32. DELIVERY OF RELATED DOCUMENTS

Upon the request of the Lessor, the Lessee will provide all documentation reasonably requested by the Lessor.

33. AUTHORITY OF PARTIES

Each party warrants that it is authorized to enter into this lease, that the person signing this lease is duly authorized to execute this lease on behalf of the party for which it so executed and that no other signatures are necessary.

34. ENTIRE AGREEMENT

This lease contains the entire agreement between the parties.

WITNESS THE FOLLOWING SIGNATURES:

Lessor

By _____

Title: _____

Lessee

By _____

Title: _____

APPROVED AS TO FORM

Attorney General of the State of West Virginia

ADDRESS AND CONTACTS OF LESSOR AND LESSEE

LESSOR: _____
Address: _____

Contact: _____
Phone: _____

LESSEE: _____
Address: _____

Contact: _____
Phone: _____

EXHIBIT B

STATE OF WEST VIRGINIA
EQUIPMENT LEASE AGREEMENT

THIS LEASE AGREEMENT, Made this _____ day of _____, 19____, between the PURCHASING DIVISION of the Department of Administration, a body politic duly organized under the laws of the State of West Virginia, Lessor, and _____, a charity food bank within the meaning of Article 8, Chapter 9 of the West Virginia Code, as amended, Lessee.

WHEREAS, Lessee, as a charity food bank, is a nonprofit organization that solicits, stores or redistributes food products to charitable organizations and individuals for the purpose of feeding needy families and individuals; and

WHEREAS, Lessee desires to use without charge available surplus state equipment; and

WHEREAS, Lessor desires to assist the charity food bank by leasing available surplus state equipment without charge.

NOW THEREFORE, THIS LEASE WITNESSETH:

That for and in consideration of the full and complete performance of the covenants, terms and conditions contained herein, the parties mutually covenant and agree as follows:

1. Lease _____

Lessee agrees to lease from Lessor the Equipment specified in the attached Equipment Schedule ("Equipment"), and Lessor agrees to lease to Lessee the Equipment in accordance with the terms and conditions of this Lease Agreement ("Lease"). Upon execution, this Lease is binding on and enforceable against Lessor and Lessee in accordance with its terms.

2. Covenants of Lessor.

Lessor shall allow Lessee to quietly have, hold and enjoy the Equipment, without suit, trouble or hinderance from Lessor during the term of this Lease, except as expressly set forth in this Lease.

3. Covenants of Lessee

Lessee is a charity food bank within the meaning of Article 8, Chapter 9 of the West Virginia Code and that it will use the Equipment for the purpose of _____ . Lessee also covenants that it will use the Equipment at the sites specified in the attached Equipment Schedule, and that it will not permit the Equipment to be used outside of the State of West Virginia, nor to be used by any other person or entity.

4. Equipment Delivery

Lessee shall take delivery of the Equipment at the location specified by the Director of Purchasing and shall be responsible for any and all costs associated with such delivery.

5. Lease Term

The term of this Lease shall be for _____ (____) months, commencing on the _____ day of _____, 19____ and terminating on the _____ day of _____, 19____. This Lease may be renewed upon mutual, written agreement of the parties.

6. Warranties/Guarantees

Lessor is not the manufacturer or dealer in the Equipment, and as such, makes no warranties or guarantees whatsoever with regard to the Equipment. Lessor hereby assigns to Lessee for and during the lease term any and all manufacturers' warranties or guarantees, if any, expressed or implied, issued on or applicable to the Equipment.

7. Lease Payments

In consideration of providing food products to charitable organizations and individuals to feed needy families and individuals, the parties agree that Lessee shall be permitted to use the Equipment for the specified purpose without charge.

8. Use and Maintenance

Lessee agrees to comply with all federal, state and local laws, ordinances, and regulations applicable to the possession, use of maintenance of the Equipment.

Lessee will not use, operate or maintain the Equipment

improperly, carelessly, or in violation of any applicable law. Lessee will, at Lessee's expense, maintain, preserve and keep the Equipment in good repair, working order and condition.

Material alterations, modifications, additions or attachments to the Equipment must have the written approval of the Lessor, which consent shall not be unreasonably withheld, and such action shall be performed at the sole expense of Lessee. All alterations, modifications, additions or attachments shall not reduce the value or usefulness of the Equipment.

During the term of this Lease, Lessor and its officers, employees or agents shall have the right at all reasonable times during business hours of Lessee to enter into and upon the property of Lessee for the purpose of inspecting the Equipment. Lessee shall also complete any and all reports pertaining to the Equipment reasonably requested by Lessor.

9. Insurance and Loss of Equipment

Lessee agrees to protect the interests of the Lessor and Lessee against Equipment losses or damage. In the event of any loss, damage, injury or accident involving the Equipment, Lessee shall promptly provide the Lessor with written notice thereof and make available to Lessor all information and documentation thereof.

If any Equipment or any portion thereof is destroyed, in whole or in part, or is damaged by fire or other casualty, or if title to, or the temporary use of, the Equipment or any part thereof is taken under the exercise of the power of eminent domain, Lessee and

Lessor will cause the net proceeds of any insurance claim or condemnation award to be applied either to the prompt repair, restoration, modification or replacement of the Equipment. Any balance of the net proceeds remaining after such work has been completed shall be paid to Lessee. Net proceeds shall mean the amount remaining from the gross proceeds of any insurance claim or condemnation award after deducting all expenses incurred in the collection of such claims or award.

If the net proceeds are insufficient to pay in full the cost of any repair, restoration, modification or replacement, Lessee shall, at Lessor's option, either (a) complete the work and pay any cost in excess of the amount of net proceeds, or (b) Lessee shall pay to Lessor the net proceeds.

10. Title to Leased Equipment

During the term of this Lease, title to the Equipment shall vest in Lessor, unless otherwise agreed in writing. In the event circumstances, such as licensure, require title to be held by Lessee, then title shall be transferred to Lessee with a lien on the title to be issued in favor of Lessor. Lessee shall promptly discharge any mechanics' or materialmen's liens placed on the Equipment.

11. Taxes and Other Charges

Lessee agrees to be responsible for the payment of any and all taxes, fees, licenses, and other charges based upon the use or

possession of the Equipment or based upon this Lease.

12. Assignment

This Lease may be sold, assigned or otherwise disposed of in whole or in part to one or more successors, grantors, holders, assignees or subassignees by Lessor. Upon any sale, disposition, assignment or reassignment, Lessee shall be provided with a duplicate original counterpart of the document by which the same is made.

Lessee agrees to execute all documents, including notices of assignment, chattel mortgages or financing statements, which may be reasonably requested by Lessor or assignee to protect its interests in the Equipment and in this Lease.

This Lease and the interest of Lessee in the Equipment may not be sold, assigned or encumbered by Lessee without the prior written consent of Lessor.

13. Indemnification

Lessee agrees that it will hold harmless and indemnify Lessor from and against any liability, obligations, losses, claims or damages whatsoever that may arise in connection with this Lease.

14. Personal Property

The Equipment is and shall at all times during the lease term be and remain, personal property.

15. Event of Default

The following constitute an "Event of Default" under this Lease:

(a) failure by Lessee to maintain insurance on the Equipment in accordance with this Lease; or

(b) failure by Lessee to observe and perform any covenant, condition, or agreement on its part to be observed or performed for a period of thirty (30) days after written notice is given to Lessee by Lessor, specifying such failure and requesting that it be remedied, provided that if the failure stated in such notice cannot be corrected within such thirty (30) day period, the Lessor will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by Lessee within the applicable period diligently pursued until the default is corrected;

(c) initiation by Lessee of a proceeding under any federal or state bankruptcy or insolvency laws; or

(d) the contract between Lessee and the Division of Human Services of the Department of Health and Human Resources is terminated.

16. Remedies on Default

Upon the occurrence of an event of default as specified in this Lease, Lessor shall provide written notification of default to which the Lessee must remedy within thirty (30) days from the date of notice of default, or Lessor shall have the right, at its

option, without any further demand or notice, to pursue any one or more of the following remedial steps:

- (a) Terminate this agreement and take possession of the Equipment and sell, lease, sublease or make other disposition of the Equipment, holding Lessee liable for the costs associated with retaking possession of the Equipment.
- (b) Proceed by appropriate court action to enforce performance by Lessee of the applicable covenants of this Lease or to recover for the breach thereof.

All of Lessee's right, title and interest in any Equipment, the possession of which is taken by Lessor upon the occurrence of an event of default, shall terminate immediately upon such repossession, and Lessee agrees to allow Lessor to recover the Equipment at Lessee's sole cost and expense.

No remedy herein conferred upon or reserved to Lessor is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Lease or now hereafter existing at law or in equity.

17. Termination

Either party may terminate this Lease upon thirty (30) days written notice to the other party. Upon a termination of this, Lessee agrees to return the Equipment to Lessor in the same condition as when it was received by Lessee, reasonable wear and

tear excepted. The party terminating this Lease in accordance with this section shall be responsible for the costs associated with returning the Equipment to Lessor.

18. Immediate Termination

The parties agree that this Lease shall be considered canceled if:

(a) the Equipment or a portion thereof is sold or transferred, voluntarily or involuntarily;

(b) the West Virginia Legislature or the federal government should subsequently fail to appropriate sufficient funds therefore, or should otherwise act to impair this lease or cause it to be canceled; or

(c) in the event it is unlawful to continue this lease.

In the event of a termination in accordance with this section, Lessee shall immediately redeliver possession of the Equipment to Lessor.

19. Force Majeure

If by reason of force majeure, Lessor or Lessee is unable, in whole or in part, to carry out its obligations under this Lease, Lessor or Lessee, as the case may be, shall not be deemed in default during the continuance of such inability. The term force majeure as used herein shall mean, without limitation, the following: acts of God; strikes; lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any

kind of the government of the United States of America or the State of West Virginia or any of their departments, agencies or officials, or any civil or military authority; insurrections; riots; landslides; earthquakes; fires; storms; droughts; floods; or explosions.

20. Notices

All notices to be given under this Lease shall be made in writing and mailed to the other party at its address set forth on the attached listing or at such address as the party made provide in writing from time to time. Any such notice shall be deemed to have been received five days subsequent to mailing.

21. Parties Bound

This Lease shall inure to the benefit of and shall be binding upon Lessor and Lessee and their respective successors and assigns.

22. Severability

In the event any provision of this Lease shall be held invalid, prohibited or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

23. Amendments

All amendments, modifications, alterations or changes to this Lease shall be in writing and signed by both parties.

24. Execution in Counterparts

This Lease may be executed in several counterparts. The parties hereto agree that ___ originals of this Lease have been executed.

25. Section Headings

All section headings contained herein are for convenience of reference only and are not intended to define or limit the scope of any provision of this Lease.

26. Governing Law

This Lease shall be governed by and construed in accordance with the laws of the State of West Virginia.

27. Delivery of Related Documents

Upon the request of the Lessor, the Lessee will provide all documentation reasonably requested by the Lessor.

28. Authority of Parties

Each party warrants that it is authorized to enter into this Lease, that the person signing this Lease is duly authorized to execute this Lease on behalf of the party for which it so executed and that no other signatures are necessary.

29. Entire Agreement; Waiver

This Lease, together with the attachments hereto, and other

documents or instruments executed by Lessee and Lessor in connection herewith, constitutes the entire agreement between the parties with respect to the Equipment. The waiver by Lessor or Lessee of any breach of any term, covenant or condition hereto shall not operate as a waiver of any subsequent breach thereof.

WITNESS THE FOLLOWING SIGNATURES:

LESSOR: _____

LESSEE: _____

BY: _____

BY: _____

TITLE: _____

TITLE: _____

APPROVED AS TO FORM THIS

_____ day of _____, 19 _____

BY: _____

Attorney General

ADDRESS AND CONTACTS OF LESSOR AND LESSEE

LESSOR: _____

Address: _____

Contact: _____

_____ Phone: _____

LESSEE: _____

Address: _____

Contact: _____

_____ Phone: _____

EQUIPMENT SCHEDULE

EQUIPMENT

LOCATION

6/6/90 STATE AS LESSOR

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 345-4000
Corporations: 342-8000



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE July 18, 1990
ADMINISTRATIVE LAW DIVISION

July 18, 1990

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Administration: Purchasing Division

RULE: New Rule, Series 5; Availability of State Surplus Build-
ings and Equipment to Charity Food Banks

DATE FILED AS AN EMERGENCY RULE: June 26, 1990

DECISION NO. 18-90

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.

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

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DECISION EMERGENCY RULE DECISION (ERD 18-90)

AGENCY: Department of Administration: Purchasing Division
RULE: New Rule, Series 5, Availability of State Surplus
Buildings and Equipment to Charity Food Banks
FILED AS AN EMERGENCY RULE: June 26, 1990

- par. 1 The Purchasing Division 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 Purchasing Division has filed this emergency rule with supporting documents with the Secretary of State on June 26, 1990 and with the LRMRC on June 26, 1990.

par. 7 It is the determination of the Secretary of State that the Purchasing Division 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 §9-8-7 reads:

The commissioner of the department (division) of finance and administration shall assist a food bank by locating and providing available state surplus buildings or equipment necessary for the operation of a charity food bank for use without charge.

par. 9 It is the determination of the Secretary of State that the Purchasing Division 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.

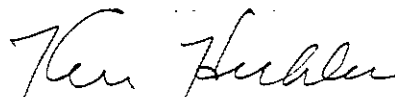
par. 12 The facts and circumstances as presented by Purchasing Division are as follows:

This Emergency Rule is needed as West Virginia Code 9-8-7 became effective July 1, 1989 and no rules were promulgated to effectuate the provision. As a result of having no regulations, charity food banks have been unable to obtain available State surplus buildings and equipment that will enable the charity food banks to better solicit, store and redistribute food products to charitable organizations and individuals for the purpose of feeding needy families and individuals. Therefore, failure to grant the emergency rule may result in substantial harm to the public interest pursuant to West Virginia Code Section 29A-3-15.

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 comply with a time limitation" and to "prevent substantial harm to public interest".

par. 14

This decision shall be cited as Emergency Rule Decision 18-90 or ERD 18-90 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with Department of Administration, Purchasing Division, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
SECRETARY OF STATE

Entered _____

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE July 18, 1990
ADMINISTRATIVE LAW DIVISION