

TITLE 77
LEGISLATIVE RULE
HUMAN RIGHTS COMMISSION

SERIES 5
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. -- 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. -- April 29, 1992

1.4. Effective Date. -- April 29, 1992

§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, 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 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. Standards of Review; Burden of Proof.

4.1. The claimant of unlawful discrimination against a club has the burden of proving unlawful discrimination.

4.2. The following guidelines shall be considered in determining whether a purported private club is truly private pursuant to the criteria contained in Section 2 and the indicators contained in Section 3:

4.2.1. An alleged private club exemption shall be examined

in light of the HRA's clear purpose of protecting only the genuine privacy of private clubs whose membership is genuinely selective.

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

4.3. The burden of proof in establishing the exemption for a truly private club and in sustaining the defense of freedom of expression is as follows:

4.3.1. The alleged private club 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.

4.3.2. The purported private club shall bear the burden of proving that compliance with the HRA imposes a serious burden on its members' freedom of expressive association.

§77-5-5. Preservation of and Defense of Right of Expressive Association.

5.1. The Commission may not 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. An alleged private club which is not in fact open to the public and which does not qualify for an exemption of truly private clubs pursuant to Section 2 of this rule may defend a prima facie case of unlawful discrimination by demonstrating that compliance with the HRA imposes a serious burden on its members' freedom of expressive association.

5.2.1. A purported private club may have a defense to a claim of unlawful discrimination if the purported private 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 race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.

5.2.2. A purported private club may have a defense to a claim of unlawful discrimination if the purported private club is selective in its membership based upon a stated criterion unique to club members and such criterion is the primary basis of association, and the denial of club membership is not automatically based upon the applicant's race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.

Example -- An alleged private club which requires that each member possess an IQ score exceeding 140 points may deny membership to a person with an IQ score less than 140 but may not

deny membership to a person with an IQ score in excess of 140 on the basis of race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.