

Title 162 WAC

HUMAN RIGHTS COMMISSION

(Formerly: Discrimination, Board Against)

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Chapter 162-04 WAC

GENERAL PROVISIONS

WAC

- 162-04-010 Definitions.
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WAC 162-04-010 Definitions. In general, words are used in this title in the same meaning as they are used in the law against discrimination, chapter 49.60, Revised Code of Washington. See, in particular, RCW 49.60-.040. The following words are used in the meaning given, unless the context clearly indicates another meaning.

"Administrative Procedure Act" means chapter 34.04 RCW.

"Age" means between 40 and 65 years of age.

"Chairperson" means the chairperson of the commission or the chairperson of a hearing tribunal, depending on the context. The word "chairperson" is used in the place of "chairman" where that word appears in the law against discrimination. The chairperson of the commission is the member of the commission designated as chairman by the governor under RCW 49.60.050.

"Clerk" means the clerk of the commission appointed pursuant to WAC 162-04-026.

"Commission" means the Washington state human rights commission.

"Complainant" means a person who has filed a complaint under authority of RCW 49.60.230.

"Complaint" means a formal complaint filed with the commission pursuant to RCW 49.60.230 and these rules.

"Executive secretary" means the executive secretary of the commission.

"Handicap" is short for the term "the presence of any sensory, mental, or physical handicap" used in the law against discrimination, and means the full term.

"Hearing tribunal," or "tribunal," means a hearing tribunal constituted under RCW 49.60.250.

"Law against discrimination" means chapter 49.60 RCW.

"Member" means a member of the commission, except where the context shows that a member of hearing tribunal is meant.

"Protected class" means the persons who are members of (or who are treated as members of) one of the groups against whom discrimination is declared to be an unfair practice by the law against discrimination. Protected classes include persons between the ages of 40 and 65, persons of any race, creed, color, national origin, sex, or marital status, and persons who are handicapped.

"Respondent" means one against whom a complaint has been filed under authority of RCW 49.60.230.

[Order 37, § 162-04-010, filed 10/27/77; Order 30, § 162-04-010, filed 11/23/76; Order 23, § 162-04-010, filed 7/21/75; Order 16, §

162-04-010, filed 5/22/74; Order 9, § 162-04-010, filed 9/23/71; Order 7 (part), § 162-04-010, filed 1/19/68.]

WAC 162-04-020 Organization and operations. (1) **Membership.** The Washington state human rights commission consists of five members, one of whom is designated as chairperson, appointed by the governor for staggered five-year terms.

(2) **Meetings.** The commission holds regular meetings commencing at 9:30 a.m. on the third Thursday of each month at various places throughout the state. The place of the meeting can be learned by writing or calling the commission.

(3) **Quorum.** Three members constitute a quorum. The affirmative vote of a majority of those present is action of the commission when there is a quorum at a meeting.

(4) **Executive secretary.** The executive secretary is the commission's chief executive. He or she is responsible for carrying out the commission's programs and directing the commission's staff.

(5) **Authority and duty.** It is the commission's duty to administer the law against discrimination, chapter 49.60 RCW, which has as its purpose the elimination and prevention of discrimination because of race, creed, color, national origin, sex, marital status, age or handicap. The commission has the authority and duty to, among other things:

(a) Study and report on all things having an impact on human rights;

(b) Make recommendations to the governor, legislature, and agencies of state and local government;

(c) Create advisory agencies and conciliation councils;

(d) In the areas of employment, public accommodations, real property transactions, credit transactions and insurance transactions, receive and process complaints of unfair practices, hold hearings, issue orders, and seek enforcement of the orders in court.

(6) **Offices.** The commission's principal office is 402 Evergreen Plaza Building, Seventh and Capitol Way, Olympia, Washington 98504. Branch offices are maintained at the following locations:

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| Seattle: | 1601 Second Avenue Building Fourth Floor Seattle, Washington 98101 |
| Spokane: | Old National Bank Building 1004 Paulsen Building Spokane, Washington 99201 |
| Pasco: | East Pasco Neighborhood Facility 205 South Wehe Room 28 Pasco, Washington 99301 |
| Tacoma: | 207 Hess Building 901 Tacoma Avenue South Tacoma, Washington 98402 |
| Yakima: | Yakima Community Center 1211 South 7th Street Yakima, Washington 98901 |

Bellingham: 401 Bellingham National
Bank Building
Bellingham, Washington 98225

(7) **Where to obtain information.** Information on the application of the law against discrimination and much other information is available at all offices of the commission. Information that branch offices are not able to supply may be obtained from the clerk at the Seattle office.

(8) **Where to make submissions or requests.** In circumstances where no special provision is made by rule in this Title 162 WAC, submissions or requests to the commission may be directed to the executive secretary at the Olympia or Seattle office.

[Order 37, § 162-04-020, filed 10/27/77; Order 30, § 162-04-020, filed 11/23/76; Order 16, § 162-04-020, filed 5/22/74; Order 10, § 162-04-020, filed 11/5/71; Order 9, § 162-04-020, filed 9/23/71; Order 7 (part), § 162-04-020, filed 1/19/68.]

WAC 162-04-024 Chairperson pro tem. (1) The commission may designate one of its members as chairperson pro tem for a particular time or for an indefinite time, to serve at the will of the commission. If the commission has not designated a chairperson pro tem and the chairperson is absent from the state, ill, or otherwise unable to carry out the duties of chairperson, then the most senior member of the commission other than the chairperson shall serve as chairperson pro tem until the chairperson is again able to carry out the duties of chairperson.

(2) The chairperson pro tem may exercise all of the powers of the chairperson during the time when the chairperson is absent, ill, or otherwise unable to carry out the duties of chairperson.

[Statutory Authority: RCW 42.18.250, 49.60.120, and chapter 49.60 RCW. 78-02-065 (Order 39), § 162-04-024, filed 1/23/78. Formerly WAC 162-08-024.]

WAC 162-04-026 Clerk. (1) **Designation.** The executive secretary with the advice and consent of the chairperson shall designate a staff member to serve as clerk of the commission.

(2) **Qualifications.** The person designated as clerk shall not have any duties involving the investigation or conciliation of complaints or the prosecution of tribunal hearings. If the clerk has been actively involved in the investigation or conciliation of a case or the prosecution of a tribunal hearing in any capacity other than as clerk, he or she shall not thereafter serve as clerk for that case, and a substitute clerk shall be designated. The purpose of this subsection is to ensure compliance with RCW 34.04.115, restricting consultation with hearing officers, and RCW 49.60.250, 2d paragraph.

(3) **Duties.** The clerk shall have the duty and power to:

(a) Attend commission meetings and provide aid and services to the chairperson and commissioners as requested by the executive secretary.

(b) Assist the chairperson of the commission in appointing hearing tribunals, issuing notices of hearing and

carrying out all other duties of the chairperson under RCW 49.60.250.

(c) Keep custody of the minutes of commission meetings, declaratory rulings, rule-making orders, and the commission's order register, and other records of action by the commissioners.

(d) Keep custody of the file of complaints after they are referred to the commission for action or report of no reasonable cause at a meeting, or upon certification of the file to the chairperson under RCW 49.60.250. The clerk shall deliver the investigator's file of cases ready for hearing to the commission's chief counsel and shall obtain return of the file when litigation is completed.

(e) Respond to requests for information on actions by the commissioners or hearing tribunals and furnish copies of records and files in the clerk's possession pursuant to WAC 162-04-030, public access to records.

(f) Have custody of the commission's seal.

(g) Certify copies of commission records under the commission's seal.

(h) Serve as clerk of hearing tribunals. In this capacity, the clerk, subject to the direction of the tribunal chairperson, shall keep custody of the official file of the tribunal hearing, date stamp and file all papers filed in the proceeding when the tribunal is not convened, serve all notices and papers required to be served by the tribunal, make the physical arrangements for hearings, provide for making and preserving the record of hearings, make transportation and other arrangements for tribunal members, respond to inquiries about tribunal practices and procedures, and generally do all things necessary and appropriate for the clerk of the judicial body to do.

(i) Serve as personal advisor to the chairperson of the commission and hearing tribunals on matters relating to the hearing process.

(j) Perform such other duties as the chairperson of the commission or the chairperson of a hearing tribunal shall assign from time to time, consistent with their duties.

(4) Upon direction from the chairperson of the commission, the chairperson of a hearing tribunal, or the executive secretary, whichever is the appropriate authority, the clerk may enter upon his or her own signature, procedural orders, notices of hearing, orders appointing hearing tribunals, notices of rule making, and similar items.

(5) **Independence.** The clerk when assisting the chairperson of the commission to carry out the chairperson's duties under RCW 49.60.250 and when serving as clerk of a hearing tribunal shall be free from supervision of the executive secretary and other staff members of the commission to the extent necessary to ensure that the chairperson of the commission and the hearing tribunals are free from influence from staff persons having a prosecuting function.

[Statutory Authority: RCW 42.18.250, 49.60.120, and chapter 49.60 RCW. 78-02-065 (Order 39), § 162-04-026, filed 1/23/78. Formerly WAC 162-08-026.]

WAC 162-04-030 Public access to records. (1) Records available.

(a) *General rule and exceptions.* All public records as defined by Initiative 276 (this includes photographs, tapes, and other materials as well as written documents) prepared, owned, used or retained by the Washington state human rights commission shall be available for public inspection and copying during normal office hours in the office where they are located, except for the following:

(i) Personal information in files maintained for the commission's employees or members to the extent that disclosure would violate their right to privacy.

(ii) The file, except for the complaint, compiled in investigating a complaint filed under RCW 49.60.230, during the time until a finding as provided by RCW 49.60.240 is reported to the commission or the case is referred to the attorney general for preparation for public hearing. Specific records in the file may be kept sealed and not made available after this time if the executive secretary has issued a protective order which states the general nature of the records and the reason why they are not open to inspection, and the records are exempt from public inspection under section 31 of Initiative 276.

(iii) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended, except that a specific record shall not be exempt when publicly cited by the commission or another agency in connection with any agency action.

(iv) Records which are relevant to a controversy to which the commission is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

(v) Any other information which is exempt from public inspection under section 31 of Initiative 276 and where disclosure would violate personal privacy or vital government interest.

(b) *Conditions which override the exceptions.* Even where it comes within one of the above exceptions to public access, a particular record shall nevertheless be available for inspection and copying if:

(i) Its disclosure would not violate personal privacy or impair a vital governmental interest;

(ii) The information which would violate personal privacy or impair a vital governmental interest can be deleted from the record; or

(iii) The record contains statistical information not descriptive of any readily identifiable person or persons.

(2) **Copying.** Persons may copy any record which may be inspected. In offices where a copying machine is kept by the commission, machine copies shall be made available to a person on request. No charge shall be made for up to ten sheets in connection with a single request, but ten cents a sheet shall be charged for each sheet beyond ten. Copying facilities may be denied when making them available would unreasonably disrupt the operation of the office, because of the volume of copying or other valid reasons. The absence or unavailability of agency copying facilities shall be given weight in determining

whether there are special circumstances justifying removal of a record from the office as provided in part (3) of this section.

(3) **Protection of records.** No record shall be allowed to be removed from a commission office by anyone other than a staff member or other officially authorized person unless special circumstances make the removal necessary or desirable, and protection of the record is reasonably assured. Before such removal is allowed a receipt itemizing the contents of the record and giving the address and telephone number of the place where it will be kept shall be signed by the person taking the record and approved in writing by the person in charge of the office or division responsible for the record.

(4) **Personnel records.** Requests for inspection of materials in the personnel files of commission employees or members shall be referred to the executive secretary, or in his or her absence, the deputy director, and promptly acted upon by him or her. When inspection is denied, it shall be the responsibility of the person making that decision to issue within 24 hours the written statement required by sections 31 (4) and 32 of Initiative 276 identifying section 31(1)(b) as the exemption authorizing withholding of the record, and explaining how inspection of the record would violate the employee's or commissioner's right of privacy. The decision of the executive secretary or deputy director shall be final agency action for purposes of judicial review.

(5) **Other records; review of denial.** Requests for inspection of records not in the personnel files of commission employees or members (that is, not covered by part (4) of this section) shall be acted upon immediately by the staff person who has charge of the record at the time the request is made. When that person believes that a request to inspect a record must be denied, he or she shall immediately contact his or her supervisor by telephone and obtain concurrence from the supervisor before denying inspection. The supervisor shall then issue, or cause to be issued, the written statement required by sections 31(4) and 42 of Initiative 276 identifying the specific exemption authorizing the withholding of the record (or part) and briefly explaining how the exemption applies to the record withheld. A copy of the statement shall be immediately delivered or mailed to the deputy director.

(6) **Interpretation.** It is the policy of the Washington state human rights commission to carry out the spirit as well as the letter of Initiative 276, and thus to afford the public maximum access to its records, subject to necessary respect for the right of individuals to privacy and the need for efficient administration of government. This regulation shall be interpreted in light of that spirit and this policy.

[Order 13, § 162-04-030, filed 2/16/73.]

Reviser's note: The reference in WAC 162-04-030(5) to section 42 of Initiative 276 apparently refers to section 32 or RCW 42.17.320.

WAC 162-04-040 State Environmental Policy Act. Pursuant to RCW 43.21C.120 and the SEPA guidelines, chapter 197-10 WAC, the commission has reviewed its

authorized activities and has found them all to be exempt under the provisions of chapter 197-10 WAC.

[Order 27, § 162-04-040, filed 5/21/76.]

WAC 162-04-050 Ethics and conflicts of interest.

(1) **Purpose.** This section is intended to guide the commission's staff and commissioners on official ethics, and to carry out the policies and purposes of chapter 42.18 RCW, the Executive Conflict of Interest Act, as provided in RCW 42.18.250.

(2) **General rule.** It is the duty of all employees of the commission and of all commissioners to maintain the highest standard of ethics in all official actions, and specifically to comply strictly with the requirements of the Executive Conflict of Interest Act, chapter 42.18 RCW.

(3) **Specific matters.** The following applications of the rule are for guidance on common problems and to serve as examples for extension by analogy; they are not a complete catalog of applications of the general rule:

(a) **Dealing with parties.** No commission employee who has duties with respect to a complaint pending before the commission shall deal in any way with the complainant or respondent, on a business or personal basis, except for routine transactions done on the same basis as other members of the public transact business with the party. An employee may continue to deal privately with a public utility or continue to shop at a party's store, if the employee deals with appropriate customer service representatives or salespersons and does not identify his or her official position or mix official business into the transaction. In circumstances unlike these, employees shall either not deal with parties or shall report the matter to the employee's supervisor, who shall relieve the employee of responsibility for the case. Commissioners who have nonroutine dealings with parties shall abstain from voting or other action on the matter.

(b) **Accepting things of value.** No commission employee or commissioner shall accept anything of economic value from a party to a complaint before the commission, or from any other person who is dealing with the commission, except under circumstances permitted in RCW 42.18.190. Permitting another person to pay for an employee's lunch is within the prohibition of this paragraph, but accepting a cup of coffee under normal office hospitality is not. If the coffee is ordered in a restaurant the prohibition of this section applies.

(c) **Honorariums for speaking.** If the speaking engagement is within the course of a person's official duties, acceptance of an honorarium or other compensation is prohibited. RCW 42.18.190. Payment of travel expenses and living expenses while traveling, or reimbursement of the commission for these expenses, is not prohibited, if the trip and payment arrangement have been approved by the employee's supervisor. It is not necessary for a person who is on the program to pay for a meal that is served, or for the price of admission to the seminar, where the custom is to not charge persons on the program for the meal at which they are speaking, or for admission to the seminar. The prohibitions of this subparagraph do not apply to commissioners, because

speaking outside of commission meetings is not a duty of commissioners.

(d) **Job offers.** No employee of the commission shall make or continue an application or request for employment with a party to a case or other matter before the commission while the employee has official duties with respect to that case or matter. If any employee is assigned a case or matter while he or she has an application pending for employment with a party to the case or matter, the employee shall either withdraw the application or report the facts to his or her supervisor and the supervisor shall relieve the employee from further responsibility for the case or matter. If any employee receives and considers a job offer from a party to a case or other matter pending before the commission with which the employee has official responsibilities the employee shall report the facts to his or her supervisor and the supervisor shall relieve the employee from any further responsibility for the case or matter.

(4) **Indirect transactions.** These rules and the Executive Conflict of Interest Act apply to conflicts of interest and ethical problems whether they come directly or indirectly through members of a person's family, through corporations of which the employee is an officer, director, trustee, partner, or employee, or through other means.

[Statutory Authority: RCW 42.18.250, 49.60.120, and chapter 49.60 RCW. 78-02-065 (Order 39), § 162-04-050, filed 1/23/78; Order 32, § 162-04-050, filed 3/21/77. Formerly WAC 162-08-050.]

WAC 162-04-060 Executive secretary may delegate duties. Unless a statute or rule provides otherwise, all duties and powers assigned to the executive secretary may be delegated by the executive secretary to other staff persons of the commission, with the executive secretary remaining responsible. The general practice of the commissioners is to assign all staff duties and powers to the executive secretary, with the understanding that the executive secretary will allocate and reallocate the tasks among the staff and see that the tasks are performed.

[Order 35, § 162-04-060, filed 9/2/77.]

WAC 162-04-070 Executive secretary may issue opinions. (1) **Authorization.** The executive secretary may issue written opinions to persons who request advice as to the application of the law against discrimination or rules or practices of the commission. The opinions shall not be inconsistent with the statute, or the regulations or policies of the commission.

(2) **Review by commission.** The executive secretary shall send a copy of each opinion to each commissioner before, or promptly after, it is sent to the person requesting it. Any commissioner may have the question of commission approval, disapproval, or revision of an opinion put on the agenda of a commission meeting, and the commission shall then approve, disapprove, or revise the opinion.

(3) **Revocation or revision.** An opinion of the executive secretary may be revoked or revised at any time by the executive secretary, or by action of the commissioners at

a meeting. The revocation or revision shall not be effective as to the person who requested the opinion until that person has notice of the revocation or revision.

(4) **Supersedure.** An opinion of the executive secretary is automatically superseded by any material change in the statutes, regulations, or case law. Notice to the person who requested the opinion is not necessary for supersedure under this paragraph.

(5) **Reliance.** When any person has relied in good faith on an opinion of the executive secretary, the commission will not thereafter assert a contrary position against that person, unless the opinion is revoked or revised, or is superseded by a material change in the statutes, regulations, or case law. This paragraph covers persons other than the person who requested the opinion, if the persons have justifiedly relied on the opinion.

(6) **Subdelegation.** The executive secretary may authorize members of the commission's staff or the commission's legal counsel to issue opinions in the name of the executive secretary, subject to the supervision of the executive secretary, and subject to all of the requirements of this section.

(7) **Authentication.** Nothing shall be an opinion of the executive secretary for purposes of this section unless it is designated as such in its caption or in its text.

[Order 35, § 162-04-070, filed 9/2/77.]

Chapter 162-06 WAC

RULES OF GENERAL APPLICATION

WAC

162-06-010 Scope of chapter.
162-06-030 Rulings granting exceptions to rules.

WAC 162-06-010 Scope of chapter. This chapter contains rules that apply generally to all of the law against discrimination and all of the commission's functions, including the matters and functions treated elsewhere in this title.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-06-010, filed 9/22/82.]

WAC 162-06-030 Rulings granting exceptions to rules. (1) **Reservation of power.** The commission reserves the power to grant exceptions in specific instances to any rule adopted by the commission (that is, to any rule in Title 162 WAC).

(2) **Authority to act.** An exception to a rule may be granted only by action of the commissioners.

(3) **Request from person affected.** Any person may request an exception to a commission rule. The request must be in writing and shall be filed with the clerk.

(4) **Contents of request for exception.** A request for exception shall contain the following:

- (a) Name of the person making the request;
- (b) Identification of the rule from which the exception is requested;
- (c) The exception requested;
- (d) A statement of the reasons why the exception is requested;

(e) A statement as to whether any person other than the requesting person will be affected by the exception, and, if so, the name and address of each person. If a class of persons is affected, it will be sufficient to name a representative or representatives of the class;

(f) A statement as to whether or not the subject of the request is included in a lawsuit or administrative complaint, and, if so, an identification of the case or cases;

(g) Any other information the requestor wishes to include.

(5) **Additional information.** The requestor shall provide any additional information with respect to the request that the requestor is asked to provide by the commissioners or staff.

(6) **Exception on own motion or at request of staff.** The commission may make an exception to the application of its rules on its own motion or at the request of its staff when the commissioners are acting on a case, a declaratory ruling, or on any other matter.

(7) **Nature of proceeding.** The commissioners will ordinarily act on the basis of the information in the written request and any additional information reported by its staff. The commission may ask a representative of the requestor to appear and make further explanation. There will be no hearing, and the procedure on a request for an exception is not a "contested case" for purposes of the Administrative Procedure Act, chapter 34.04 RCW. Persons desiring a formal ruling with right of appeal may petition for a declaratory ruling under RCW 34.04.080 and WAC 162-08-700.

(8) **Procedure when complaint is pending.** If the question of an exception arises or is pending while a complaint filed under RCW 49.60.230 is pending, the request for exception will not be considered initially by the commissioners but will be processed by the staff in the course of its work on the complaint. The staff will include a recommended disposition of an exception (whether requested by an interested person or the staff itself) in its recommended finding made under RCW 49.60.240. The recommendation on an exception will be brought especially to the attention of the commissioners at the time the finding comes before the commissioners for action. When the recommendation is in a finding of "reasonable cause," it shall be brought to the commissioners for ruling before the staff commences its endeavors to eliminate the unfair practice by conference, conciliation, and persuasion.

(9) **Grounds for exception.** The commission will grant an exception when in its judgment the reasons for the exception outweigh the adverse effect that the exception will have on the purposes of the law against discrimination or the administration of the law against discrimination. Reasons for an exception include:

(a) Compliance with the rule would cause unreasonable hardship;

(b) The special circumstances of the requestor are such that literal application of the rule will not carry out the purposes of the law against discrimination, or may work counter to the purposes of the law against discrimination;

(c) The purposes of the law against discrimination will be equally well served and the requestor will be benefited by application of the rule in a modified form;

(d) Conflict with the purpose or policy of other law.

(10) **Ruling on request for exception.** The commission will grant or deny a request for an exception as a matter of judgment. The commission may decline to rule on a request. A grant of an exception may be subject to conditions set out in the ruling, and it may be limited in time. The ruling will be in writing and copies will be sent to the requesting person and to any other persons who are named in the request as interested persons or who ask for a copy of the ruling.

(11) **Revocation or revision.** A ruling granting an exception may be revoked or revised at any time by the commissioners. The revocation or revision shall take effect when written notice of the revocation or revision is delivered to the requestor, or three days after it is mailed to the last known address of the requestor, whichever is earlier.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-06-030, filed 9/22/82.]

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WAC

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- 162-08-003 Definitions. [Rules (part), filed 3/23/62; Rule 1, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-004 Complaint. [Rules (part), filed 3/23/62; Rule 2, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-005 Investigation and conciliation. [Rules (part), filed 3/23/62; Rule 2 (part), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-006 Reconsideration by the board. [Rules (part), filed 3/23/62; Rule 3 (part) and Rule 10, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-007 Hearings. [Rules (part), filed 3/23/62; Rule 5 (part), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-008 Motions—Objections. [Rules (part), filed 3/23/62; Rule 5 (part), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-009 Record. [Rules (part), filed 3/23/62; Rule 6, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-010 Appearance at hearing. [Rules (part), filed 3/23/62; Rules (3c) and (5d), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-024 Chairperson pro tem. [Order 30, § 162-04-024 (codified as WAC 162-08-024), filed 11/23/76.] Repealed by 78-02-065 (Order 39), filed 1/23/78.
- 162-08-026 Clerk. [Order 30, § 162-04-026 (codified as WAC 162-08-026), filed 11/23/76.] Repealed by 78-02-065 (Order 39), filed 1/23/78. Statutory Authority: RCW 42.18.250, 49.60.120 and chapter 49.60 RCW. Later promulgation, see WAC 162-04-024.
- 162-08-050 Ethics and conflicts of interest. [Order 30, § 162-04-050 (codified as WAC 162-08-050), filed 11/23/76.] Repealed by 78-02-065 (Order 39), filed 1/23/78. Statutory Authority: RCW 42.18.250, 49.60.120 and chapter 49.60 RCW. Later promulgation, see WAC 162-04-050.
- 162-08-070 Computation of time. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-090 Service of process—By whom served. [Rules (part), filed 3/23/62; Rule (2g), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-095 Service of process—Subpoenas. [Rules (part), filed 3/23/62; Rule 7 (part), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-180 Service of process—Payment of fees. [Rules (part), filed 3/23/62; Rule 7 (part), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-230 Depositions. [Rules (part), filed 3/23/62; Rule 8, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-281 Consolidation of cases. [Order 7, § 162-08-281, filed 1/19/68.] Repealed by Order 35, filed 9/2/77.
- 162-08-321 Omitted matters. [Order 7, § 162-08-321, filed 1/19/68.] Repealed by Order 35, filed 9/2/77.
- 162-08-370 Official notice—Matters of law. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-380 Official notice—Material facts. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-400 Stipulations of fact admissible. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-412 No discussion of proceedings until decision. [Rules (part), filed 3/23/62; Rule 11, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-415 Orders. [Rules (part), filed 3/23/62; Rule 9, filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-420 Definition of issues before hearing. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-430 Prehearing conference rule. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-450 Submission of documentary evidence in advance. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-460 Excerpts from documentary evidence to be introduced at hearing. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-520 Rules of evidence and procedure. [Rules (part), filed 3/23/62; Rule (52), filed 10/18/61.] Repealed by Order 7, filed 1/19/68.
- 162-08-535 Amendment, modification, rescission and publication of rules—How rules may be amended. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-540 Amendment, modification, rescission and publication of rules—Petition for rule making, amendment or repeal of rules. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-580 Declaratory rulings. [Rules (part), filed 3/23/62.] Repealed by Order 7, filed 1/19/68.
- 162-08-620 Declaratory rulings. [Order 7, § 162-08-620, filed 1/19/68.] Repealed by Order 35, filed 9/2/77.

GENERAL

WAC 162-08-011 Scope of rules. (1) General. These rules (chapter 162-08 WAC) shall govern all practice and procedure before the commission, including practice before hearing tribunals.

(2) **Uniform rules inapplicable.** These rules are intended to be comprehensive and the uniform rules contained in chapter 1-08 WAC shall not be applicable.

(3) **Relation to statutes.** These rules supplement the statutory procedures in the Administrative Procedure Act, chapter 34.04 RCW, and the law against discrimination, chapter 49.60 RCW. Where provisions of the law against discrimination are inconsistent with the Administrative Procedure Act, the Administrative Procedure Act governs. RCW 34.04.910.

(4) **Amendments apply to pending cases.** An amendment to this chapter applies to cases pending at the time of the adoption of the amendment, unless the amendment or rule-making order says that it does not apply to pending cases. An amendment to this chapter does not require that anything already done be redone to comply with the amendment, unless the amendment expressly says so.

[Order 35, § 162-08-011, filed 9/2/77; Order 7, § 162-08-011, filed 1/19/68.]

WAC 162-08-013 Interpretation--Waiver. (1) **Interpretation.** These rules shall be interpreted liberally to promote justice and to facilitate the decision of cases on the merits.

(2) **Waiver.** The chairperson of the commission or of a tribunal, on the chairperson's own initiative or on motion of a party, may waive or alter the procedures in any of these rules and may enlarge or shorten the time within which an act must be done in a particular case, in order to serve the ends of justice. The chairperson of the commission or of a tribunal may condition a waiver or alteration of rules on satisfaction by a party or attorney of terms in the manner provided in WAC 162-08-115 [162-08-015]. In addition, the chairperson of a tribunal may condition the waiver or alteration of rules on payment by a person or attorney of compensation to any person injured by departure from the rules, in the manner provided in WAC 162-08-115.

[Order 35, § 162-08-013, filed 9/2/77.]

WAC 162-08-015 Sanctions. (1) **Tribunal hearings.** In a case which has been noted for hearing the chairperson of the tribunal on the chairperson's own initiative or on motion of a party may order a party or counsel who uses these rules for the purpose of delay, or who fails to comply with these rules or other procedures previously ordered, to satisfy terms or pay compensatory damages including attorney's fees to any other person who has been harmed by the delay or the failure to comply. The chairperson may condition the right of a party to take specific action or raise specific defenses on satisfaction of the terms of the order or payment of the damages and attorney's fees. The chairperson may condition the right of a counsel to participate further in the case on satisfaction of the terms of an order or payment of the damages and attorney's fees. The tribunal shall incorporate in its final order any sanctions order which has not been complied with, so that the sanctions order may be enforced as provided in RCW 49.60.260 and

49.60.270 and appealed from as provided in RCW 34.04.130.

(2) **Other proceedings.** In a proceeding not covered by paragraph (1) of this section, the chairperson of the commission may order a person or counsel who uses these rules for the purpose of delay, or who fails to comply with these rules or other procedures previously ordered, to satisfy terms, and the chairperson may condition further participation in a proceeding on compliance with these rules or orders imposing terms, but the chairperson of the commission shall not impose sanctions in the form of payment of damages or attorney's fees.

(3) **Debarment of attorneys.** A lawyer or other person appearing in a representative capacity who consistently violates the rules of the commission or who uses them for delay, or who consistently violates the orders of the chairperson of the commission or of a hearing tribunal or tribunals, may be debarred or suspended from practicing before the commission, or may be required to meet terms as a condition of continuing to practice before the commission. No person shall be debarred, suspended, or subjected to conditions under this subsection except upon vote of the commission after a hearing of which the person shall have at least twenty days notice and where the person shall have the opportunity to show cause why he or she should not be so debarred, suspended, or subjected to conditions. A hearing under this subsection shall be held only if a commissioner or a tribunal member has requested one and the commissioners have voted to hold one. When the commissioners have voted for a hearing, the chairperson of the commission shall determine how the hearing shall proceed and shall see that notice under RCW 34.04.090 is issued.

[Order 35, § 162-08-015, filed 9/2/77.]

WAC 162-08-017 Usage and definitions. (1) **Usage.** In this chapter, unless the context indicates otherwise, the following words are used in the senses here expressed:

"Shall" expresses a command.

"May" expresses permission.

"Will" expresses the future occurrence of an event.

"Must" expresses a requirement that has to be met only if a person chooses to do something which the person is free to do or not to do. *Example:* "A respondent who wishes to raise any matter constituting an avoidance or affirmative defense . . . must plead the matter as an affirmative defense . . ."

(2) **Definitions.** In this chapter, unless the context indicates otherwise, the following words are used in the meaning here given:

"Case" means the entire proceeding following from the filing of a complaint under RCW 49.60.230.

"Commission" means the Washington state human rights commission as an institution, whether acting through the commissioners, a hearing tribunal, the executive secretary or staff, its legal counsel, or others, except where the context indicates one of the narrower meanings.

"Conciliation" means the process provided in RCW 49.60.240 for the elimination by conference, conciliation,

and persuasion of an unfair practice after a finding has been made that there is reasonable cause for believing that the unfair practice has been or is being committed.

"Hearing" means the public session of a hearing tribunal to receive the evidence on which a case will be decided. It is the equivalent of "trial" in court practice.

"Person" has the broad meaning given the word in RCW 49.60.040. It includes the commission.

[Order 35, § 162-08-017, filed 9/2/77.]

WAC 162-08-019 Procedure when none is specified.

(1) **Any orderly procedure.** To take care of a problem for which no procedure is specified by this chapter, the Administrative Procedure Act, chapter 34.04 RCW, or the law against discrimination, chapter 49.60 RCW, any orderly procedure may be used. Appropriate procedures may be taken from the Washington civil rules for superior courts, the federal rules of civil procedure, or the rules of other administrative agencies of the state of Washington or of the United States.

(2) **By chairperson.** The chairperson of the commission or of a hearing tribunal may specify the procedure to be used to dispose of any matter not covered by this chapter, or any matter covered by a rule that has been waived or altered in the interest of justice under authority of WAC 162-08-013.

(3) **By others.** A person who wishes to address a matter for which no procedure has been specified in this chapter or the statutes may choose an appropriate procedure, identify it, and commence to act upon it. If the chairperson of the commission or hearing tribunal, as appropriate, finds that the matter is one that should not be addressed, the chairperson shall decline to respond to the attempted procedure, with the explanation that this is done because the object of the procedure is not appropriate for commission or tribunal action. If the chairperson finds that the object is appropriate but the chosen procedure is not appropriate, the chairperson shall specify an appropriate procedure to be used.

[Order 35, § 162-08-019, filed 9/2/77.]

WAC 162-08-021 Who may appear and practice.

No person other than the following may appear in a representative capacity before the commission:

(1) **Washington lawyer.** An attorney at law entitled to practice before the supreme court of the state of Washington;

(2) **Other lawyer.** An attorney at law entitled to practice before the highest court of record of any other state, if attorneys at law of the state of Washington are permitted to appear in a representative capacity before administrative agencies of such other state, and if not otherwise prohibited by Washington law;

(3) **Legal intern.** A legal intern licensed to engage in the practice of law in the state of Washington under admission to practice Rule 9;

(4) **Officer, etc.** A bona fide officer, partner, or full time employee of an association, partnership, or corporation appearing for the association, partnership, or corporation.

(1986 Ed.)

[Order 35, § 162-08-021, filed 9/2/77; Order 7, § 162-08-021, filed 1/19/68.]

WAC 162-08-031 Computation of time. In computing any period of time prescribed or allowed by commission rules, by commission order, or by statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event, the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall not be counted.

[Order 35, § 162-08-031, filed 9/2/77; Order 7, § 162-08-031, filed 1/19/68.]

WAC 162-08-041 Service and filing of papers. (1)

How served. Service of papers may be made personally or by first-class mail, registered or certified mail, or telegraph, or by leaving a copy at the principal office or place of business of the person to be served.

(2) **Who serves.** The commission shall cause to be served all orders, notices and other papers issued by it, together with any other papers which it is required by law to serve. Every other paper shall be caused to be served by the party filing it.

(3) **Upon whom served.** All papers served by the commission or any party shall be served at the time of filing upon all counsel of record and upon parties not represented by counsel or upon their agents designated by them or by law. Any counsel entering an appearance subsequent to the initiation of the proceeding shall notify all other counsel then of record and all parties not represented by counsel of such fact.

(4) **Service on commission.** In a pending matter in which the commission is being represented by the attorney general or a staff person other than the clerk, service on the commission shall be made by serving the attorney or staff person who is acting for the commission. In such matters, *filing* a paper with the clerk is *not* service on the commission.

(5) **Service by mail.** If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. Unless earlier receipt is shown, service by mail shall be deemed complete upon the third day following the day upon which the papers are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday following the third day.

(6) **Filing, generally.** Papers required to be filed with the commission shall be deemed filed on actual receipt at the commission's Olympia or Seattle office, or other place previously specified, accompanied by proof of service on all parties required to be served.

(7) **Filing with hearing tribunal.** Papers required to be filed with a hearing tribunal shall be filed with the clerk, Fourth Floor, 1601 Second Avenue Building, Seattle,

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98101, unless otherwise directed. They must be accompanied by proof of service on all parties required to be served. The original of each paper shall be filed, accompanied by four copies (for use by the tribunal members and clerk).

[Order 35, § 162-08-041, filed 9/2/77; Order 7, § 162-08-041, filed 1/19/68.]

WAC 162-08-051 Form of papers. Except for papers filed with a hearing tribunal (covered by WAC 162-08-241) and any other papers where the form is specified by rule, papers may be submitted in any form. The commission requests, but does not require, that all papers be typewritten on white paper of letter size (8 1/2 x 11").

[Order 35, § 162-08-051, filed 9/2/77; Order 7, § 162-08-051, filed 1/19/68.]

WAC 162-08-061 Relationship of commission to complainant. (1) **Commission's role and objectives.** In investigating cases the commission seeks to ascertain the facts in order to make an impartial finding of "reasonable cause" or not. It has no predisposition in favor of either complainants or respondents. If "reasonable cause" is found, then the objective of the commission is to obtain the remedy that will best eliminate the unfair practices and prevent their recurrence. The judgment as to what will eliminate an unfair practice for purposes of reaching an agreement under RCW 49.60.240 is made initially by the executive secretary, or other staff persons pursuant to the executive secretary's direction, and ultimately by the commissioners. The judgment as to what will eliminate an unfair practice and carry out the purposes of the human rights law after hearing under RCW 49.60.250 is made by the hearing tribunal.

(2) **Independence from complainant.** A court confines its judgment to the parties before it, and it seeks to resolve in a single action the entire dispute between them. The commission was not designed to compete with the courts as a forum for the vindication of private rights; its task is to work for the public good of eliminating and preventing discrimination. If the commission were obligated to dispose of every contention between a complainant and respondent arising out of the alleged discrimination, then its resources would be diverted from this central task. RCW 49.60.020 preserves the civil and criminal remedies of a person who has filed a complaint under the law against discrimination, and RCW 49.60.030 authorizes suits directly in court, in order to free the commission to work for the remedy best designed to eliminate and prevent discrimination. In negotiating a settlement or seeking an order, the commission generally works for provisions restoring the complainant as nearly as possible to the position he or she would be in if he or she had not been discriminated against, because this is usually an effective way to eliminate the discrimination and prevent its recurrence. But where, in the commission's judgment, provisions fully restoring the complainant (for instance, reinstatement to the job with back pay) would be inadequate to eliminate a pattern of discrimination, the commission will hold out for additional

terms, even though the respondent is willing to settle on the basis of full relief for the complainant only. In different circumstances, the commission may determine that discrimination will be effectively eliminated and prevented by an order that does not afford the complainant every item of relief to which he or she may have a legal claim. The commission assumes that persons who complain to it are as interested in the elimination and prevention of discrimination in general as in their individual cases. If a person is interested only in relief for himself or herself, he or she is advised to seek his or her remedy directly in court. In any event, a person who is dissatisfied with the commission's disposition of his or her complaint may still assert in court any outstanding personal claims which he or she may have against the respondent.

[Order 35, § 162-08-061, filed 9/2/77; Order 7, § 162-08-061, filed 1/19/68.]

WAC 162-08-062 Concurrent remedies. (1) **Other remedies.** The law against discrimination preserves other remedies (RCW 49.60.020) and provides for lawsuits in court (RCW 49.60.030(2)) in addition to an administrative remedy. A person may simultaneously sue in state court, file a complaint with the commission, pursue federal remedies, and sometimes proceed under a local ordinance. Persons should be aware, however, that general rules of law prevent recovering more than once for the same item of injury and sometimes bind a litigant to the result of the first case that is determined, whatever its outcome.

(2) **Abeysance—Real estate transactions.** Real estate transactions complaints will be held in abeyance during the pendency of a federal proceeding unless the federal proceeding has been deferred pending state action, as is provided by RCW 49.60.226.

(3) **Abeysance—General rule.** A complaint of an unfair practice other than in real estate transactions will be held in abeyance during the pendency of a case in federal or state court litigating the same claim, whether under the law against discrimination or a similar law, unless the executive secretary or the commissioners direct that the complaint continue to be processed. A complaint of an unfair practice other than in real estate transactions will not be held in abeyance during pendency of a federal, state, or local administrative proceeding, unless the executive secretary or commissioners determine that it should be held in abeyance.

[Order 35, § 162-08-062, filed 9/2/77.]

WAC 162-08-071 Complaints by aggrieved persons. (1) **Scope of section.** This section applies to complaints by persons claiming to be aggrieved by an alleged unfair practice filed under RCW 49.60.230(1), and to complaints by employers or principals filed under RCW 49.60.230(3). Complaints issued by the commission are covered by WAC 162-08-072.

(2) **Signature and oath.** A complaint shall be in writing, signed by the complainant or the complainant's lawyer, and sworn to before a notary public or other person authorized by law to administer oaths. Notarial

service for this purpose is available without charge at all offices of the commission.

(3) **Contents.** A complaint shall contain the following:

- (a) The name of the person making the complaint;
- (b) The name, address and telephone number, if any, of the person against whom the complaint is made, if known to the complainant;
- (c) A specific charge of an unfair practice;
- (d) A clear and concise statement of the facts which constitute the alleged unfair practice;
- (e) The date or dates of the alleged unfair practice, and if the alleged unfair practice is of a continuing nature, the dates between which said continuing acts of discrimination are alleged to have occurred.

(4) **Forms.** Printed complaint forms are available at all commission offices.

(5) **Time for filing.** The complaint must be filed within six months after the date of occurrence of the alleged unfair practice. RCW 49.60.230. If the alleged unfair practice is of a continuing nature, the date of the occurrence of the unfair practice shall be deemed to be any date subsequent to the commencement of the alleged unfair act up to and including the date when the alleged unfair practice stopped.

(6) **Computation of time.** The six month period for filing a complaint expires at 5:00 p.m. on the day before the corresponding day of the sixth month following the event. If this day is a Saturday, Sunday, or a legal holiday, the time expires at 5:00 p.m. on the next day which is not a Saturday, Sunday, or legal holiday. For example, a complaint of an event occurring on 5 January would ordinarily have to be filed by 5:00 p.m. on 4 July, but since 4 July is a legal holiday, the time for filing the complaint would expire at 5:00 p.m. on 5 July, or at 5:00 p.m. Monday, if 5 July comes on a Saturday or Sunday.

(7) **Technical defects.** A complaint shall not be considered defective because it lacks any technical requirement, including the oath, if the technical requirement is later met or if no one is legally harmed.

[Statutory Authority: RCW 49.60.120(3) and 34.04.020. 79-11-041 (Order 40), § 162-08-071, filed 10/12/79; Order 35, § 162-08-071, filed 9/2/77; Order 7, § 162-08-071, filed 1/19/68.]

WAC 162-08-072 Complaints issued by commission. (1) **Who may initiate.** Complaints issued by the commission under RCW 49.60.230(2) may be initiated by the commissioners or by the executive secretary personally.

(2) **By commissioners.** Initiation of a complaint by the commissioners shall be by motion at a meeting. The executive secretary shall transcribe a carried motion from the minutes onto a paper designated "complaint," attest it with a signature, and process it.

(3) **By executive secretary.** The executive secretary may initiate a commission complaint by personally signing a document saying that the commission has reason to believe that the person shown as respondent has been engaged or is engaged in an unfair practice, identifying the nature of the unfair practice. The executive secretary shall notify each commissioner in advance of issuing a complaint, or if advance notice is not possible because of

an emergency, or because a commissioner cannot be reached, or for other reason, the executive secretary shall give the notice as soon after issuing the complaint as possible. Any commissioner may have placed on the agenda of the next commission meeting the question of whether the complaint shall stand. If this is done, the commissioners shall vote to sustain or rescind the complaint, after such debate and deliberation as is appropriate, but without taking testimony, or hearing arguments or reports from anyone but commissioners and staff, except as the commission by vote may direct.

(4) **Basis for commission complaint.** A commission complaint may be issued when the commission "has reason to believe that any person has been engaged in an unfair practice." RCW 49.60.230(2). The basis of belief for a complaint is different from the basis for a finding under RCW 49.60.240 of "reasonable cause for believing that an unfair practice has been or is being committed." The finding of reasonable cause or not is based on the commission's own investigation and ascertainment of facts after receipt of a complaint. The basis of belief for the purpose of initiating a commission complaint is information from any source sufficient, in the judgment of the commission, to justify an investigation and finding of whether or not there is reasonable cause for believing that an unfair practice has been or is being committed.

[Order 35, § 162-08-072, filed 9/2/77.]

WAC 162-08-081 Amendment of complaint prior to notice of hearing. (1) **Scope of section.** This section governs amendments of complaints prior to the time of amendment for the purpose of hearing. Amendment of a complaint for the purpose of hearing is governed by WAC 162-08-201. Amendments after notice of hearing are governed by WAC 162-08-265.

(2) **General rule.** A complaint, or any part thereof, may be fairly and reasonably amended as a matter of right at any time.

(3) **By whom.** The complaint may be amended by any of the following: The complainant, the commissioners, or the executive secretary or any member of the commission's staff who is authorized by the executive secretary to amend complaints.

(4) **Form.** Amendment of a complaint may be done by rewriting and superceding the entire text of the complaint or by filing a supplemental paper containing only the amendment.

(5) **Not necessary for finding.** The investigation pursuant to RCW 49.60.240 will cover the respondent's treatment of all persons who may have been affected by the unfair practice alleged in a complaint, and a reasonable cause finding will apply to all persons affected by the unfair practice that is found. The complainant may or may not be one of those persons. No amendment of the complaint is necessary for such a finding. Also, if reasonable cause to believe that an unfair practice not alleged in the complaint is discovered in the course of investigating the complaint, a finding may be made to that effect as provided in WAC 162-08-094(3) and the case will proceed on that basis, without the necessity of amending the complaint.

(6) **Identification of respondents.** No amendment of a complaint is necessary to make corrections in the identification of respondents in the findings of fact, if the respondents newly designated have notice of the complaint, or are given notice of the complaint, or reasonably should have known of the complaint. The findings of fact may correct the names or identification of respondents by substituting correct names, by adding persons as respondents, or by deleting persons as respondents.

(7) **Findings supersede complaint.** The findings supersede the complaint in identifying the issues and persons before the commission in the case, and continue to do so until and unless an amended complaint for purposes of hearing is filed under WAC 162-08-201.

[Order 35, § 162-08-081, filed 9/2/77; Order 7, § 162-08-081, filed 1/19/68.]

WAC 162-08-091 Withdrawal of complaint. (1) **Consent necessary.** A complaint or any part thereof may be withdrawn only with the consent of the commissioners.

(2) **Form.** A request for withdrawal of a complaint must be in writing and signed by the complainant and must state in full the reasons why withdrawal is requested. Blank forms may be obtained at commission offices.

[Order 35, § 162-08-091, filed 9/2/77; Order 7, § 162-08-091, filed 1/19/68.]

INVESTIGATION OF COMPLAINTS—FINDINGS

WAC 162-08-093 Reference to staff. Unless the chairperson of the commission directs otherwise for a particular complaint, all complaints shall be investigated by the section of the staff designated for that purpose by the executive secretary, and the executive secretary shall have full power to assign and reassign cases for investigation by particular staff persons, and to assign and reassign staff persons to the section of the staff that investigates complaints, on a full time or part time basis.

[Statutory Authority: RCW 42.18.250, 49.60.120 and chapter 49.60 RCW. 78-02-065 (Order 39), § 162-08-093, filed 1/23/78; Order 35, § 162-08-093, filed 9/2/77.]

WAC 162-08-094 Investigation. (1) **Copy of complaint to respondent.** Within a reasonably prompt time after a complaint is filed the staff shall furnish a copy of the complaint to the respondent and shall afford the respondent an opportunity to reply in writing. No error or omission in carrying out this step shall affect the validity of the complaint or prevent further processing of it.

(2) **Preliminary evaluation of complaint.** If the allegations of the complaint, if true, show no basis for commission action, then the staff without further investigation may enter a finding of no reasonable cause or write a recommendation for a finding of no jurisdiction, or other appropriate disposition.

(3) **Scope of investigation.** The investigation will ordinarily be directed at ascertaining the facts concerning

the unfair practice alleged in the complaint. It is appropriate to compare the treatment of others with that of the complainant, and to see whether others of the complainant's class have also been treated the way the complaint says the complainant was. If in the course of investigation the investigator finds evidence of unrelated unfair practices the investigator may report this to his or her supervisor for evaluation as to whether the commission should initiate an amendment or a separate complaint, or, if sufficient facts are already at hand, the investigator may prepare findings on the unrelated unfair practice, after notifying the respondent of an intention to do so and giving the respondent a chance to comment on or rebut the facts in the possession of the investigator. The investigation may include ascertaining whether an unfair practice is part of a pattern.

[Order 35, § 162-08-094, filed 9/2/77.]

WAC 162-08-096 Protective orders to seal produced documents. (1) **May be requested.** Any person who is asked or subpoenaed to produce records may request a protective order to have a particular document or part of document that has been produced or will be produced kept confidential for official use only, without public access.

(2) **To whom addressed.** Prior to notice of hearing, a request for a protective order shall be made to the executive secretary. After notice of hearing, a request for a protective order shall be made by motion to the chairperson of the tribunal, as provided in WAC 162-08-131(3).

(3) **Form of request.** Unless otherwise agreed with a staff person, requests for a protective order shall be in writing and shall state the requestor's reasons why a protective order should be issued for the documents covered.

(4) **Grounds for issuance.** A protective order may be made only upon findings that:

(a) The document or part of document is exempt from public disclosure under RCW 42.17.260 and 42.17.310 (Initiative 276) and the commission's implementing regulation, WAC 162-04-030, and;

(b) The requestor has shown legitimate need for confidentiality of the document or part of document.

(5) **Form of order.** The protective order shall be in writing and shall bear the caption of the case, date of entry of the order, and signature of the executive secretary or other authorized staff person or the chairperson of the tribunal. The text of the order shall contain:

(a) A description in general terms of each document covered by the order. *Example:* "Report dated _____ of Dr. _____ to respondent on results of physical examination of the complainant, two pages."

(b) A statement of the specific exemption from the disclosure provisions of Initiative 276 authorizing the withholding of the record or part of record and a brief explanation of how the exemption applies to what is withheld. See RCW 42.17.310(4).

(c) A statement of why there is need for confidentiality of the document or part of document.

(6) **Filing of order.** The protective order shall be affixed to a sealed envelope containing the protected document and both shall be kept in the case file, or, alternatively, the original order and protected document may be kept at another place and a copy of the protective order placed in the case file along with a notation as to where the original order and protected document are kept.

(7) **Effect of order.** Except as may be provided in the protective order, documents covered by the protective order shall not be revealed to anyone other than commissioners, members of the commission's staff, and the commission's legal counsel for official purposes and shall not become public when the rest of the file becomes public as provided in WAC 162-04-030 (1)(a)(ii), but:

(a) Nothing shall prevent the use of a protected document in an administrative hearing or court case, including admission of the document into the public record of the hearing or case, and;

(b) Nothing herein is intended to prevent a court from ordering production of a protected document under RCW 42.17.310(3) or other authority.

(8) **Other protective orders.** Issuance of other kinds of protective orders concerning discovery is governed by WAC 162-08-131(3).

[Order 35, § 162-08-096, filed 9/2/77.]

WAC 162-08-098 Findings. (1) **General.** The findings document shall contain (a) *findings of fact*, and (b) an *ultimate finding* of reasonable cause or no reasonable cause for believing that an unfair practice has been or is being committed, or a finding on jurisdiction, as provided in (2) of this section.

(2) **Jurisdictional dispositions.** When the facts found show that the matter is not within the jurisdiction of the commission, the ultimate finding shall be "no jurisdiction" rather than "reasonable cause" or "no reasonable cause." In extraordinary circumstances where the commission technically has jurisdiction but for overriding reasons of law or policy is unable to properly exercise its jurisdiction, the ultimate finding may be "jurisdiction declined." An example of such an extraordinary circumstance is a complaint against the commission itself.

(3) **Scope of reasonable cause finding.** A finding of reasonable cause shall specify the unfair practice found and, as nearly as possible, the person or persons against whom the unfair practice has been committed. If the facts show an unfair practice against a class of persons, the class shall be indicated to the extent possible. If unfair practices unrelated to those alleged in the complaint are found while investigating the complaint, findings may be made also on such unfair practices, after following the procedure provided in WAC 162-08-094(3).

(4) **Action by commissioners.** Findings of no reasonable cause shall be reported to the commissioners at a meeting, and shall thereafter stand as the action of the commission unless the commissioners vote to set aside a particular finding, either on motion of a commissioner, or on petition for reconsideration under RCW 49.60.255 and WAC 162-08-101. Findings of reasonable cause shall not be reported to the commissioners, but shall be

used by the staff for the purpose of endeavoring to eliminate the unfair practices by conference, conciliation, and persuasion. Proposed findings of "no jurisdiction" or "jurisdiction declined" shall be reported to the commissioners and shall become commission action when approved by vote of the commissioners at a meeting.

(5) **Effect of findings.** The findings (rather than the complaint) identify what unfair practices the commission's staff has or has not reasonable cause to believe have been or are being committed. See WAC 162-08-081(7). A finding of reasonable cause for believing that an unfair practice has been or is being committed is the basis for staff efforts to eliminate the unfair practice by conference, conciliation, and persuasion. A finding that there is or is not reasonable cause for believing that an unfair practice has been or is being committed is not an adjudication of whether or not an unfair practice has been or is being committed.

[Order 35, § 162-08-098, filed 9/2/77.]

WAC 162-08-099 Termination of a case without findings of fact. (1) **Authorized.** The commission in appropriate circumstances may terminate its action on a case without making findings of fact pursuant to RCW 49.60.240. This section provides procedures in some of the circumstances.

(2) **Withdrawal of complaint.** No findings or other procedures in RCW 49.60.240 and 49.60.250 are necessary when the complainant has requested withdrawal of the complaint and the commissioners have consented to the withdrawal pursuant to WAC 162-08-091.

(3) **Settled before finding.** A case may be settled before findings of fact are made, when the commission's staff and a respondent have entered into a written settlement agreement (prefinding settlement). Prefinding settlement agreements shall be presented to the commissioners. The commissioners, if they approve, shall enter an order setting forth the terms of the agreement, the same as if the agreement were presented to the commissioners under RCW 49.60.240 and WAC 162-08-106 after findings of fact. A prefinding settlement is not binding on the commission until the commissioners vote to accept it and issue their order, and the commissioners' acceptance and order are subject to reconsideration as provided in this paragraph. An aggrieved complainant may petition for reconsideration of a prefinding settlement and the commission may act on the petition in the manner provided in WAC 162-08-108 for reconsideration of terms of a postfinding agreement.

(4) **Administrative closure.** A case may be administratively closed by vote of the commissioners when the complaint has been resolved informally, or has been adjudicated in another forum, or has become moot, or cannot be investigated because the complainant or respondent cannot be found, or when other circumstances justify administrative closure. Administrative closure is an official termination of work on a complaint prior to completion of the entire statutory process, letting the complaint lie in its present posture. A case that has been administratively closed can be administratively reopened by vote of the commissioners.

[Order 35, § 162-08-099, filed 9/2/77.]

WAC 162-08-101 Reconsideration of finding of no reasonable cause. (1) **Form of petition.** A petition for reconsideration pursuant to RCW 49.60.255 of a finding that there is no reasonable cause for believing that an unfair practice has been or is being committed shall be in writing and shall state specifically the grounds on which it is based.

(2) **Copy to respondent.** The clerk shall serve a copy of the petition on the respondent or respondents.

(3) **Scheduling.** For purposes of scheduling reconsiderations under RCW 49.60.255 the "next regular meeting" of the commission shall be deemed to be the next regular meeting coming ten days or more after the clerk has served the respondent with notification of the reconsideration. The complainant, or a respondent who intends to appear before the commission at the reconsideration, may request that the matter be held over to a subsequent commission meeting in order to reduce travel expense or for other good reason. The clerk may reschedule reconsiderations to carry out this paragraph.

(4) **Nature of proceeding.** Reconsideration of findings is not an adversary hearing and is not a contested case for purposes of the Administration Procedure Act, chapter 34.04 RCW. The only issues before the commission are whether the staff's investigation was adequate and whether the finding of no reasonable cause follows from the facts. The burden is on the complainant to convince the commission to exercise its discretion to set aside the prior action. The commission will not itself make a finding of fact. It will either continue to accept the original findings of fact or send the complaint back to the staff for reinvestigation and entry of new findings.

(5) **Procedure before commission.**

(a) **Complainant's role.** The complainant has the right to appear before the commission in person or by counsel and "present such facts, evidence and affidavits of witnesses as may support the complaint." If the complainant does not appear at the scheduled hearing the petition may be ruled upon on the basis of the written materials in the possession of the commission. The commission requests that the facts and evidence be put into writing and, along with affidavits, be filed with the clerk in time to permit distribution to commissioners and the respondent prior to the meeting. Live testimony may be presented only with the permission of the chairperson. Any person testifying as a witness will not be subject to cross examination or placed under oath unless the chairperson chooses to do so, but any person testifying, as well as the complainant and respondent and their attorneys, may be questioned by commissioners and staff. The time allowed for hearing a reconsideration shall be within the control of the chairperson and will ordinarily not exceed 15 minutes for the complainant's presentation.

(b) **Staff's role.** The chairperson may, and upon request of any commissioner shall, call upon staff persons to inform the commission of the staff's reasons for prior action and its recommendations for future action.

(c) **Respondent's role.** A respondent has no duty to appear or present any facts, evidence, or affidavits of witnesses, but the respondent has the right to be present at the reconsideration in person or by counsel and to speak to the commission for a reasonable time, ordinarily equal to that allowed to the complainant. A respondent may present facts, evidence, or affidavits of witnesses in the manner provided for complainants, but respondents are asked not to do so unless there is actual need for the material. No adverse inference will be made from a respondent's choice not to submit materials or not to attend a reconsideration.

(6) **Decision on reconsideration of finding.** The petition shall be granted or denied, in the discretion of the commission.

(a) **Reconsideration granted.** If reconsideration is granted the finding is set aside and the case is returned to the staff for reinvestigation and entry of a new finding based on the facts as ascertained on reinvestigation.

(b) **Reconsideration denied.** If reconsideration is denied, the finding of no reasonable cause stands as the commission's final disposition of the case. The disposition is not appealable, see *Mattox v. Washington State Board Against Discrimination*, 13 Wn.App. 406, 535 P.2d 470 (1975), but the finding of no reasonable cause does not prevent the complainant from suing the respondent in court.

(7) **Expedited procedure.** Upon written waiver by both parties of their right to appear before and have a petition for reconsideration determined by the full commission, the chairperson may direct that the matter be heard and decided by a single designated commissioner, at a time and place to be established by the commissioner delegated to hear the case in question. A determination by a single commissioner under the expedited procedure shall be considered to be done on behalf of the commission, and there shall be no appeal of the decision to the full commission. The clerk shall report any decision rendered under the expedited procedure to the full commission, within a reasonable time after the decision is rendered. Upon request of any commissioner, the determination of the single commissioner shall be put on the agenda of the next meeting and reviewed by the full commission. Reconsideration hearings under the expedited procedure shall be conducted in the same manner as reconsideration requests before the full commission, except as otherwise specified in this subsection.

(8) **Limitation on petitions for reconsideration.** No more than one petition for reconsideration may be filed under the provisions of RCW 49.60.255 by the same complainant in the same case.

(9) **Other reconsideration.** Reconsideration of the terms of a conciliated agreement is governed by WAC 162-08-172 [162-08-108]. Nothing in this section shall prevent the commission from reconsidering its disposition of a complaint without findings of fact or on jurisdictional grounds, either on petition or on its own motion, when it would serve the end of justice to do so. The procedure in this section may be used to request reconsideration of the disposition of a complaint without findings of fact or on jurisdictional grounds.

[Order 35, § 162-08-101, filed 9/2/77; Order 7, § 162-08-101, filed 1/19/68.]

CONCILIATION

WAC 162-08-102 Objective of conciliation. The commission's staff in its endeavors to eliminate an unfair practice by conference, conciliation and persuasion under RCW 49.60.250 shall be guided by the purposes of the law against discrimination and by the policies and objectives of the commission, particularly as expressed in WAC 162-08-061 and 162-08-298. Elimination of an unfair practice includes elimination of the effects of the unfair practice, as well as assurance of the discontinuance of the unfair practice.

[Order 35, § 162-08-102, filed 9/2/77.]

WAC 162-08-104 Conciliation negotiations. (1) **Endeavors of staff.** The task of staff is to endeavor to eliminate the unfair practice through agreement with the respondent. The extent of effort to be expended toward this end will depend on the likelihood that agreement on mutually acceptable terms can be reached. If, for example, it is apparent from an exchange of letters that agreement cannot be reached, it is not necessary to hold a conference. If a respondent has been afforded a reasonable opportunity to negotiate, the staff endeavor is sufficient.

(2) **Reopening conciliation.** The making and service of a finding that no agreement can be reached does not preclude renewing negotiations or reaching an agreement at a later time. The finding that no agreement can be reached is not affected by a renewal of negotiations, but it is superseded by an agreement that is thereafter reached.

[Order 35, § 162-08-104, filed 9/2/77.]

WAC 162-08-106 Approval of agreements. An agreement reached between the commission's staff and a respondent under RCW 49.60.240 shall be reduced to writing, signed by the respondent and a member of the commission's staff, and presented to the commissioners at a meeting. The agreement is not binding on the commission until the commissioners vote to accept it, and the commissioners' acceptance is subject to their power to reconsider the terms of agreement under RCW 49.60.255 and WAC 162-08-108.

[Order 35, § 162-08-106, filed 9/2/77.]

WAC 162-08-108 Reconsideration of terms of agreement. (1) **Form of petition.** A petition for reconsideration pursuant to RCW 49.60.255 of the terms of an agreement reached under RCW 49.60.240 shall be in writing and shall state the reasons why the complainant is dissatisfied with the agreement.

(2) **Procedure.** The petition shall be processed the same as a petition for reconsideration of a finding of no reasonable cause, using the procedure set out in WAC 162-08-101.

(3) **Nature of proceeding.** Reconsideration of the terms of an agreement is not an adversary hearing or a

contested case for purposes of the Administrative Procedure Act, chapter 34.04 RCW. The commission will hear why the complainant is dissatisfied with the agreement reached and will decide whether it should set aside the agreement and order and direct staff to reopen endeavors to eliminate the unfair practice by conference, conciliation, and persuasion. The burden is on the complainant to convince the commission to exercise its discretion to do this.

(4) **Decision on reconsideration of terms of agreement.** The petition shall be granted or denied, in the discretion of the commission.

(a) **Reconsideration granted.** If reconsideration is granted the agreement and order made under RCW 49.60.240 are set aside and the case is returned to the staff for new endeavors to eliminate the unfair practice by conference, conciliation, and persuasion.

(b) **Reconsideration denied.** If reconsideration is denied, the agreement stands and the order under RCW 49.60.240 stands as the commission's final disposition of the case. This disposition is not appealable, *Mattox v. Washington state board against discrimination*, 13 Wn.App. 406, 535 P.2d 470 (1975), but in the commission's view the complainant may decline to accept the terms of the agreement and may independently sue the respondent in court.

(5) **Limitation on petitions for reconsideration.** No more than one petition for reconsideration of the terms of agreement may be filed under the provisions of RCW 49.60.255 by the same complainant in the same case.

(6) **Other reconsideration.** Reconsideration of a finding of no reasonable cause and of the disposition of a complaint without findings of fact or for jurisdictional reasons, is covered by WAC 162-08-101.

[Order 35, § 162-08-108, filed 9/2/77.]

WAC 162-08-109 Breach of conciliated agreement. If an agreement and order for the elimination of an unfair practice made under RCW 49.60.240 is breached, the executive secretary may take action appropriate in the circumstances, including one or more of the following:

(1) **Specific enforcement.** Bringing an action in court for specific enforcement of the agreement;

(2) **Setting aside.** Recommending to the commissioners that the agreement and order be set aside, in whole or in part, and that the case be returned to the staff for renewed conference, conciliation and persuasion, or for hearing; or

(3) **Report to prosecuting attorney.** Reporting the violation to the prosecuting attorney for prosecution under RCW 49.60.310.

[Order 35, § 162-08-109, filed 9/2/77.]

SUBPOENAS

WAC 162-08-111 Who may issue subpoenas. Subpoenas may be issued by the chairperson of the commission, any member of the commission designated by the

chairperson, the executive secretary, or any staff member designated by the executive secretary. In addition, after notice of hearing has issued, subpoenas in the case to be heard may be issued by the chairperson of the hearing tribunal, any member of the hearing tribunal designated by the chairperson of the tribunal, or an attorney at law who is an attorney of record for a party to the case, as is provided by RCW 34.04.105.

[Order 35, § 162-08-111, filed 9/2/77; Order 7, § 162-08-111, filed 1/19/68.]

WAC 162-08-114 Service of subpoenas. Subpoenas may be served in any manner authorized by WAC 162-08-041 and RCW 49.60.140 for the service of papers generally.

[Order 35, § 162-08-114, filed 9/2/77.]

WAC 162-08-116 Witness fees and allowances. (1) **General rule.** Pursuant to RCW 49.60.170, witnesses shall be paid the same fees and mileage as are paid witnesses in the courts of this state, and by the same party who would pay if the proceeding were before a court of this state.

(2) **Travel allowances.** Any person authorized to issue subpoenas who desires the attendance of a witness residing outside of the county in which attendance is desired, or more than twenty miles from the place where attendance is desired, may compel the attendance of the witness by subpoena accompanied by ten dollars, tickets or other arrangements for travel, or an appropriate mileage allowance if the witness agrees to travel by automobile, plus not less than one day's per diem at the rate of twenty-five dollars per day for meals and lodging. The chairperson of the commission, or of the tribunal, if one is convened, may order paid such additional amounts for meals, lodging, and travel as the chairperson may deem reasonable for the attendance of the witness, consistent with RCW 5.56.010 and other law governing allowances for witnesses in the courts of this state, if the witness objects to the arrangements or amounts provided by the person issuing the subpoena.

(3) **Fees of expert witness.** The party that calls an expert witness shall pay the professional fee charged by the expert witness and all other costs of the testimony or discovery proceeding. If cross-examination of an expert witness exceeds the time taken for direct examination, the party or parties cross examining shall reimburse the party that called the expert witness for that portion of the fee charged by the expert witness and the other costs of the testimony or discovery proceeding.

[Order 35, § 162-08-116, filed 9/2/77.]

WAC 162-08-121 Motions relating to subpoenas. After notice of hearing, motions relating to subpoenas shall be addressed to the chairperson of the hearing tribunal. In all other circumstances motions relating to subpoenas shall be addressed to the chairperson of the commission. Motion procedure is governed by WAC 162-08-271.

[Order 35, § 162-08-121, filed 9/2/77; Order 7, § 162-08-121, filed 1/19/68.]

DISCOVERY

WAC 162-08-131 Discovery. (1) **General rule.** Except as otherwise provided in these rules, discovery may be obtained and used in the manner provided by Rules 26, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of the civil rules for superior courts (CR). Wherever those rules refer to the court, the hearing tribunal shall be substituted, except when notice of hearing has not issued, in which case the chairperson of the commission shall stand in place of the court.

(2) **Status of complainant.** For purposes of discovery a complainant shall be considered to be a party to a case growing out of that complainant's complaint, whether or not the complainant is a party for other purposes (see WAC 162-08-261, 162-08-288).

(3) **Protective orders.**

(a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, a tribunal chairperson, or, if no tribunal has been appointed, the chairperson of the commission, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense caused by discovery, including all orders a court could make under CR 26(c).

(b) If a motion for a protective order is denied in whole or in part, the chairperson may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of WAC 162-08-171(1) incorporating CR 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(c) Protective orders sealing produced documents shall meet the requirements of WAC 162-08-096 in addition to those of this section.

[Order 35, § 162-08-131, filed 9/2/77; Order 7, § 162-08-131, filed 1/19/68.]

WAC 162-08-135 Depositions. (1) **When taken.** Depositions may be taken at any time after notice of hearing has been served. Depositions may be taken before notice of hearing if the person whose testimony is taken and all respondents are notified that the testimony may be used as evidence in any hearing arising out of the matter under investigation. No leave of the chairperson is required to take a deposition at any time.

(2) **Persons before whom deposition may be taken.** Depositions may be taken before a member of the commission's staff who is not involved in the investigation of the complaint or matter, before a person who has been commissioned to take depositions by the chairperson of a tribunal or of the commission, or before any other person before whom a deposition could be taken for use in superior court, as provided in CR 28. Any designated deposition officer or member of the commission's staff may administer an oath for the purpose of taking a deposition.

(3) **Manner of taking.** Depositions may be taken in any reasonable manner, including any manner provided in CR 30.

(4) **Record of examination.** Depositions may be recorded mechanically or videotaped.

(5) **Times for depositions on written questions.** For depositions on written questions consisting of twenty questions or less, cross questions shall be served within ten days after service of the notice and copy of the direct questions, and redirect and recross questions shall be served within five days after being served with the prior questions. For depositions consisting of more than twenty questions the times shall be as provided in CR 31(a) (15, 10, and 10 days, respectively). The number of questions for purposes of this subsection is the total of written questions from the same person to the same person outstanding at the same time, but questions outstanding only because they have not been timely answered shall not be counted.

(6) **Time for signing.** If signature is not waived, the witness shall have five days after submission of the transcription of testimony to register desired changes and to sign it, unless the transcription exceeds fifty pages, in which event the witness shall have ten days, and if the witness does not sign in the given time the officer may sign in the manner provided in CR 30(e).

(7) **Certification and transmittal for filing.** The officer shall certify the deposition in the manner provided in CR 30(f) and shall send or deliver the original copy to the clerk, unsealed. The officer need not notify parties of the transmittal.

(8) **Filing and publication.** Upon receipt of a transcribed deposition the clerk shall examine it to see if it has been certified, and if it has been, the clerk shall file it. A deposition that has been so filed is published and is available for any use to which a deposition may be put, except to the extent that use is limited by a protective order (see WAC 162-08-096).

(9) **Use of depositions.** Depositions can be used in the same way as depositions for court can be used under the civil rules for superior court, particularly CR 32.

(10) **Effect of errors and irregularities.** Errors and irregularities in deposition practice are waived unless they substantially prejudice a party and are promptly objected to as provided in CR 32(d).

[Order 35, § 162-08-135, filed 9/2/77.]

WAC 162-08-141 Interrogatories to parties. (1) **General rule.** Any party may serve written interrogatories on any adverse party to be answered in the manner provided in CR 33.

(2) **Time for use.** Interrogatories may be served at any time after the party to whom they are directed has been served with notice of hearing, or otherwise has become a party to the case.

(3) **Form.** Interrogatories shall be in the form provided in CR 33.

(4) **Service.** A party submitting interrogatories shall serve and leave the original and two copies with the party to whom the interrogatories are directed. A blank interrogatory should not be filed with the clerk unless the party has need to do so, for example, as an attachment to the motion to compel answers to interrogatories.

(5) **Time for answer.** Interrogatories shall be answered within ten days after service, unless the interrogatories, together with others served by the same party within the

last ten days, exceed 20 questions, in which event the interrogatories shall be answered within 20 days.

(6) **Service and filing of answers.** The party to whom interrogatories are directed shall serve a copy of the interrogatories with answers on the party that propounded the interrogatories and may file the original with the clerk, along with proof of service on the propounding party.

(7) **Use as evidence.** Answers to interrogatories may be used as evidence when they are admissible under the administrative law standards of evidence specified in RCW 34.04.100 and WAC 162-08-292.

[Order 35, § 162-08-141, filed 9/2/77; Order 7, § 162-08-141, filed 1/19/68.]

WAC 162-08-151 Production of documents and things and entry upon land for inspection and other purposes. (1) **General rule.** Any party to a case that has been noted for hearing may use the discovery practice provided in CR 34.

(2) **Time for response.** The party upon whom the request is served shall serve its written response within 10 days, unless the parties have stipulated to, or the tribunal chairperson has allowed, a shorter or longer time.

[Order 35, § 162-08-151, filed 9/2/77; Order 7, § 162-08-151, filed 1/19/68.]

WAC 162-08-155 Physical and mental examination of persons. Every tribunal chairperson shall have authority to issue any order a judge in the chairperson's place could make under CR 35.

[Order 35, § 162-08-155, filed 9/2/77.]

WAC 162-08-161 Request for admission. (1) **General rule.** At any time after notice of hearing has been served a party may serve on any other party a written request for admission as provided by CR 36.

(2) **Form.** Requests for admission shall be arranged so that after each separate request there is left a blank space reasonably calculated to enable the answer to be typed in.

(3) **Service.** The requesting party shall serve on the party to whom the requests are directed the original and two copies of the request document. There is no need to file the request document with the clerk at the time it is served on the party.

(4) **Time for response.** Matters of which an admission is requested are admitted unless answer or objection is served within 10 days, unless the total requests, together with others served by the same party within the last 10 days, exceed 20 in number, in which event 20 days shall be allowed.

(5) **Admitted if no response.** When requests for admission are not responded to within the requisite number of days, the matters requested to be admitted are admitted, without need for further action by counsel or the tribunal.

(6) **Service and filing of responses.** The party to whom the requests are directed shall serve the requesting party with a copy of the request document with responses and

shall file the original with the clerk, along with proof of service on the requesting party.

(7) **Effect of admission; relief from admission.** Any matter admitted under this rule, whether admitted affirmatively or by not answering, is conclusively established unless the chairperson of the tribunal on motion permits withdrawal or amendment of an admission as provided in this paragraph. Withdrawal or amendment of an admission may be allowed when:

(a) It would be manifestly unjust to hold the party to the admission;

(b) The presentation of the merits of the case will be subserved by the withdrawal or amendment of the admission; and

(c) The party that obtained the admission does not satisfy the chairperson that withdrawal or amendment will prejudice the party in maintaining its case or defense on the merits.

(8) **Admission limited to case.** Any admission made under this rule is for the pending case only and is not an admission for any other purpose or proceeding.

[Order 35, § 162-08-161, filed 9/2/77; Order 7, § 162-08-161, filed 1/19/68.]

WAC 162-08-171 Failure to make discovery--Sanctions. (1) **Order compelling discovery.** Tribunal chairpersons are authorized to make any order that a court could make under CR 37(a), including an order awarding expenses of the motion to compel discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may obtain an order compelling discovery by motion to the tribunal chairperson. The form of the motion and the procedure for its disposition is governed by WAC 162-08-271. When taking a deposition on oral examination, the proponent of the question may either complete or adjourn the examination before applying for an order.

(2) **Sanctions orders.**

(a) The chairperson of the tribunal shall make such sanctions orders as are just if a party or an officer, director or managing agent of a party or a person designated in the manner provided in CR 30(b)(6) or 31(a) to testify on behalf of a party:

(i) Fails to obey an order to provide or permit discovery, including an order made under (1) of this section or under WAC 162-08-155;

(ii) Fails to appear before the officer who is to take the deposition, after being served with a proper notice;

(iii) Fails to serve answers or objections to interrogatories; or

(iv) Fails to serve a written response to a request for inspection under WAC 162-08-151 after proper service of the request.

(b) Among appropriate sanctions orders are the following:

(i) An order that the matters regarding which the order was made, or any other designated facts, shall be taken to be established for the purposes of the hearing, in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence; and

(iii) An order striking out pleadings or parts thereof, or staying further proceedings, until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering an order for relief by default against the disobedient party.

(c) In lieu of any of the foregoing orders or in addition to them, the chairperson of the tribunal shall require the party failing to obey the order or failing to act, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the chairperson finds that the failure was substantially justified or that other circumstances in the particular case make an award of expenses unjust.

(3) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under WAC 162-08-161, and if the party that requested the admissions thereafter proves the genuineness of the document or the truth of the matter, that party may move the tribunal chairperson for an order requiring the party that failed to admit to pay to the moving party the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The chairperson shall make the order unless the chairperson finds that, (a) the request was held objectionable under the procedure of CR 36(a), or, (b) the admission sought was of no substantial importance, or, (c) the party failing to admit had reasonable ground to believe that the fact was not true or the document was not genuine, or (d) there was other good reason for the failure to admit.

[Order 35, § 162-08-171, filed 9/2/77; Order 7, § 162-08-171, filed 1/19/68.]

PREHEARING PROCEDURE

WAC 162-08-190 Certification of file. (1) **General.** Certification of the file to the chairperson as provided in RCW 49.60.250 in case of failure to reach an agreement under RCW 49.60.240 for the elimination of an unfair practice shall be done in the manner provided in this section.

(2) **Who certifies.** Certification shall be by the clerk.

(3) **Form of certificate.** The certificate shall be in writing and dated and signed by the clerk and shall be in substantially the following form: "I certify that the attached is the entire file, including the complaint and all findings made, of the Washington state human rights commission staff for the complaint included in the file."

(4) **Custody of file.** The certified file, including the certificate, shall be held in the custody of the clerk, who shall see that it is available for use by the chairperson of the commission and counsel for the commission, and for examination and copying by others.

[Order 35, § 162-108-190, filed 9/2/77.]

WAC 162-08-201 Prehearing amendment of complaint. (1) **Required.** Before a case is noted for hearing, counsel for the commission shall prepare an amended complaint as provided in this section.

(2) **Basis for.** The amended complaint shall be based on the facts as they are believed by the commission's counsel and staff to exist at the time the amended complaint is signed.

(3) **Scope.** The amended complaint shall identify the persons who are proper parties for the hearing and the matters to be heard. It need not be limited to parties or matters mentioned in the complaint filed under RCW 49.60.230, and it need not include all parties or matters mentioned in that complaint.

(4) **Form.** The complaint shall be in the form designated in WAC 162-08-241.

(5) **Contents.** The amended complaint shall contain the following:

(a) Identification of the specific unfair practice or practices alleged.

(b) A clear and concise statement of the facts which form the basis for the alleged unfair practices.

(c) A request for relief, setting out the terms or substance of the order which the executive secretary believes would be appropriate for the tribunal to enter if the matters alleged in the complaint are proven to be true.

(6) **Pleading statutory steps.** It is not necessary for counsel for the commission to plead that the statutory steps prior to the amended complaint have been completed. All statutory steps prior to hearing will be deemed to have been properly completed unless an issue is raised by specific negative averment in an answer as provided in WAC 162-08-251(5).

(7) **Signing.** The amended complaint shall be signed by counsel for the commission and verified by the executive secretary or a staff member designated by the executive secretary to verify on behalf of the executive secretary.

[Order 35, § 162-08-201, filed 9/2/77; Order 7, § 162-08-201, filed 1/19/68.]

WAC 162-08-211 Appointment of hearing tribunal.

(1) **When appointed.** When the file has been certified (WAC 162-08-190) and counsel for the commission has prepared an amended complaint for hearing (WAC 162-08-201) the chairperson of the commission shall appoint a hearing tribunal as provided in RCW 49.60-250 and this section.

(2) **Qualifications of tribunal members.** Commissioners are qualified by virtue of their office to serve as tribunal members. A person other than a commissioner who is appointed as a member of a hearing tribunal shall have the following qualifications, in the judgment of the chairperson of the commission:

(a) Agreement with the purposes of the law against discrimination, and the ability and willingness to follow and apply the law against discrimination and the regulations, declaratory rulings, and other formal interpretations of the law against discrimination made by vote of the commissioners (as distinguished from interpretations

of the commission's staff or legal counsel), see WAC 162-08-278(7);

(b) Knowledge of civil rights law, or of the problems with which the law against discrimination is concerned, or of the type of unfair practice alleged, or of the industry, circumstances or situation of the respondent in the case, or of the community or region where the alleged events occurred, or other knowledge or background that will help the person to understand the issues to be considered.

(c) Ability to judge the case fairly, without partiality toward the complainant, counsel for the commission, the respondent, or any other participant in the hearing; and

(d) Willingness to devote the time necessary to fully hear the case and decide it with reasonable promptness.

(3) **Sources of tribunal members.** Any person may volunteer to serve as a hearing tribunal member by submitting in writing to the clerk the person's name, address, and telephone number, and a statement of qualifications, including the matters covered in part (2) of this section. The clerk shall supply blank forms on which to make submissions, and the clerk may assist persons by taking the information orally or by telephone and preparing the form for signature. The clerk shall keep a file of submitted forms, which shall be open to public inspection. The chairperson of the commission shall consult the file when appointing hearing tribunals, but the chairperson shall not be limited to the appointment of persons who have volunteered. If the chairperson solicits the service of a person who has not already volunteered, the person shall sign a statement in the form provided by this subsection and file it with the clerk for inclusion in the file with the volunteered names. This paragraph does not apply to commissioners.

(4) **Chairperson of tribunal.** The chairperson of each hearing tribunal shall be either a member of the commission or an attorney at law. The chairperson of the commission shall designate one of the members of the hearing tribunal to serve as chairperson of the hearing tribunal. If the chairperson of the tribunal resigns, is removed, or otherwise becomes unable to serve, the chairperson of the commission shall designate another member to serve as chairperson. The designation may be of the new member appointed to take the chairperson's place, or of another member, if the other member is qualified to serve as chairperson.

(5) **Alternative tribunal member.** The chairperson of the commission may appoint a fourth person as an alternative tribunal member. If a vacancy in tribunal membership other than chairperson occurs prior to the hearing, the alternative member thereupon becomes an active member, whether or not the alternative member has participated in prehearing proceedings. If such a vacancy occurs after commencement of the hearing, the alternative member becomes an active member only if he or she has attended the hearing up to the time when the vacancy occurs.

(6) **Acceptance of appointment and responsibilities.** Each tribunal member shall execute in writing and file with the clerk a document in substantially the following form:

"I accept appointment as a member of the hearing tribunal which will hear the case captioned above for the Washington state human rights commission.

I certify that, to my knowledge, I have no conflicts of interest which would interfere with my ability to judge fairly and impartially.

I promise to judge this case with fairness and impartiality to all parties and persons.

I agree with the purposes of the law against discrimination and I will follow and apply the law against discrimination and the regulations, declaratory rulings, and other formal interpretations of the law against discrimination made by vote of the commissioners.

I am willing to devote the time necessary to fully hear the case and decide it with reasonable promptness.

Dated _____
"_____
(Signature)

A person who serves as a hearing tribunal member for several cases may file a single document in similar form but saying instead that the person will not accept appointment to a case where the person's interests interfere with the person's ability to judge fairly and impartially. The clerk shall file the document for an individual case in the file for the case and shall file a document for more than one case in a separate file under the person's name or, alternatively, in one case file with a copy in the file of each other case on which the person serves.

(7) **Vacancies.** Vacancies in tribunal membership caused by resignation, disability, removal under WAC 162-08-215, or other cause, and not filled by an alternate tribunal member under part (3) of this section shall be filled through appointment by the chairperson of the commission in the manner provided for appointment of original tribunal members. If filling a vacancy would make necessary the repetition of a substantial amount of work, the chairperson may leave a vacancy unfilled and the case may proceed before a tribunal of two, as provided in WAC 162-08-278.

[Order 35, § 162-08-211, filed 9/2/77; Order 33, § 162-08-211, filed 3/21/77; Order 7, § 162-08-211, filed 1/19/68.]

WAC 162-08-212 Compensation and expenses of tribunal members. (1) **Compensation.** Tribunal chairpersons shall be compensated for their services at the rate of twenty-five dollars per hour and tribunal members other than the chairperson shall be compensated at the rate of fifteen dollars per hour. Alternate tribunal members shall be compensated at the rate of fifteen dollars per hour for any time expended in attendance with the tribunal at the direction of the chairperson of the commission.

(2) **Travel expense.** Tribunal members and alternates while in session or on official business shall receive reimbursement for travel expenses incurred during such time in accordance with RCW 43.03.050 and 43.03.060 as now existing or hereafter amended.

(3) **Other expenses.** Support services (such as secretarial service) for tribunals will generally be supplied by the commission, through the clerk. Where this is not possible or practical (for example, long distance telephone calls from a tribunal member's office or motel room) the commission will reimburse the tribunal member or alternate for necessary expenses incurred in the course of duty. Reimbursement will be on the basis of invoice vouchers submitted to the clerk. A single invoice voucher may be used for claims for compensation and for expenses.

(4) **Vouchers.** Tribunal members and alternates shall be paid upon receipt by the clerk of state invoice vouchers, for compensation, and state travel vouchers, for travel expenses.

[Order 37, § 162-08-212, filed 10/27/77; Order 35, § 162-08-212, filed 9/2/77.]

WAC 162-08-215 Removal of tribunal members for cause. (1) **Motion authorized.** Any party or attorney for a party may move for the removal of one or more tribunal members or alternates for cause as provided in this section.

(2) **Time for filing.** The motion must be filed with the clerk within ten days after the notice of hearing was served on the moving party, except that a motion to remove a tribunal member who has been appointed after the notice of hearing has been served may be filed within ten days after notice of appointment of that tribunal member has been received by the moving party.

(3) **To whom directed.** The motion shall be directed to the chairperson of the commission and filed with the clerk.

(4) **Contents of motion; affidavits.** The motion must state the reason why removal is requested and it must be supported by affidavits that establish the factual basis for the motion, unless the factual basis is of record in the case or is already known to the chairperson. Affidavits must be made on personal knowledge, must set forth facts that are admissible in evidence in an administrative hearing, and must show affirmatively that the affiant is competent to testify to the matters stated in them. Authenticated copies of all papers or parts of papers referred to in an affidavit must be filed with the affidavit, unless they are already on file with the commission or are published and are generally available. If the moving party has reason to believe that evidence in support of the motion exists and the moving party cannot with reasonable diligence obtain the evidence in proper form within the time allowed for filing the motion, the moving party may make a request in the motion for additional time to submit evidence. The request for additional time must be supported by an affidavit which describes as specifically as possible the evidence and the efforts that have been made and will be made to get it, and the time needed to obtain and file the evidence. The chairperson may grant additional time if the chairperson finds that the described evidence would be usable and helpful in passing on the motion and if the moving party has shown diligence in attempting to get it.

(5) **Grounds for removal.** A member of a hearing tribunal shall be removed if the chairperson finds that the motion and supporting affidavits show that the person is disqualified under the law of this state on disqualification of judicial and quasi-judicial officers. Grounds for disqualification include:

(a) Prejudgment concerning issues of fact about parties in the particular case;

(b) Partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party, as distinguished from issues of law or policy;

(c) An interest whereby one stands to gain or lose by a decision either way;

(d) Any interest, pecuniary or not, the probable and natural tendency of which is to create a bias in the mind of the person for or against a party; and

(e) That service of the person would cause the tribunal to appear to a reasonably prudent and disinterested person to lack the appearance of fairness, impartiality, and neutrality.

(6) **Ruling on motion.** If the chairperson of the commission finds from the facts established by the motion and supporting affidavits that the tribunal member is disqualified, the chairperson shall issue an order removing the member from service on the tribunal.

(7) **Limitations on motions.** No party and attorney for that party may make more than one motion for removal of the same tribunal member from the same tribunal, and no motion may be made after the tribunal member has made or participated in making any ruling involving discretion.

(8) **Disposition of denied motions.** In order to avoid a possible prejudicial effect on the tribunal member, a ruling denying a motion for removal shall not be revealed to the tribunal or its members by the chairperson or any representative of the commission. Motions and other papers filed under this section shall not be filed in the tribunal's case file or otherwise revealed to the tribunal or its members by representatives of the commission but shall be included in the record certified to superior court for purposes of appeal or enforcement, as is provided in WAC 162-08-231(5). Tribunal members are directed not to examine files concerning them or the case, other than the tribunal's case file, during pendency of the hearing and are directed not to inquire as to whether a party or attorney has moved for removal of a tribunal member or alternate. Members of the public are requested not to reveal to a tribunal member the fact that a motion for removal has been made and denied. The procedure in this subsection is intended to establish a high standard of fairness, not a minimum standard of fairness. Knowledge by a hearing tribunal member about a motion for his or her removal shall not disqualify the member from continuing to serve, in the absence of evidence of actual bias arising from special facts.

[Order 35, § 162-08-215, filed 9/2/77; Order 33, § 162-08-215, filed 3/21/77.]

WAC 162-08-217 Objection to manner of appointment. (1) **Authorized.** A party aggrieved by the manner in which a hearing tribunal has been appointed may file

with the clerk a motion to the chairperson of the commission for an order setting aside the chairperson's order appointing the hearing tribunal, in whole or in part.

(2) **Time for motion.** The motion must be filed within 15 days after the aggrieved party has been served with the notice of hearing.

(3) **Grounds for motion.** The motion to set aside the order appointing hearing tribunal must be based on an error of law or procedure, other than appointment of a disqualified tribunal member or alternate, that invalidates the appointment of the entire panel of the tribunal, or of a member, members, or alternate. Each ground for the motion shall be specifically set out and supported by legal authority.

(4) **Procedure.** The motion shall be considered and decided as provided in WAC 162-08-271.

(5) **Effect on time of hearing.** The chairperson may postpone the time of hearing if the chairperson does not have time to dispose of a motion under this section before the scheduled hearing date.

(6) **Where filed.** Papers filed under this section shall not be placed in the file of the tribunal hearing during the pendency of the hearing. If the case is brought to the superior court for review or enforcement, papers filed under this section shall be included in the record certified to the superior court, as provided in WAC 162-08-231.

[Order 33, § 162-08-217, filed 3/21/77.]

WAC 162-08-221 Notice of hearing. (1) **Applicable statutes.** When a hearing tribunal has been appointed, the clerk shall give notice of hearing to all parties as provided in RCW 49.60.250 and 34.04.090(1).

(2) **Indefinite time.** The clerk may, in his or her discretion, omit the time and place of hearing from the notice with the explanation that the time and place will be set by later notice from the tribunal chairperson, given at least twenty days in advance of the time of hearing.

(3) **Issues.** The notice of hearing shall state that the issues involved in the hearing are (a) whether the respondent committed the unfair practices stated in the amended complaint, and, if so, (b) what order is appropriate. A copy of the amended complaint shall be attached to the notice of hearing.

(4) **Notice of rules.** The notice of hearing shall inform the respondent of the answer rule, WAC 162-08-251, and it shall inform the complainant of a complainant's rights and options under WAC 162-08-261.

(5) **Consolidation of cases.** The chairperson, in the original notice of hearing or by amended notice of hearing, may consolidate cases when they involve common questions of law or fact.

[Order 37, § 162-08-221, filed 10/27/77; Order 35, § 161-08-221, filed 9/2/77; Order 7, § 162-08-221, filed 1/19/68.]

WAC 162-08-231 Record, pleadings. (1) **Record.** The record of a tribunal hearing shall include the items specified in RCW 34.04.090:

- "(a) All pleadings, motions, intermediate rulings;
- (b) Evidence received or considered;
- (c) A statement of matters officially noticed;

(d) Questions and offers of proof, objections, and rulings thereon;

(e) Proposed findings and exceptions;

(f) Any decision, opinion, or report by the officer presiding at the hearing."

It shall also include the chairperson's order appointing the hearing tribunal and the statement of acceptance of appointment and responsibilities filed by tribunal members pursuant to WAC 162-08-211(6).

(2) **Pleadings.** Pleadings for a tribunal hearing shall include the notice of hearing with amended complaint attached and any amended complaints subsequently filed, plus any answers or replies filed under WAC 162-08-251, and the original complaint if, but only if, the complainant elects to proceed under it as provided in WAC 162-08-261.

(3) **Proceedings before notice of hearing not part of record.** Except for the order appointing the hearing tribunal and statements of acceptance of appointment and responsibilities filed by tribunal members pursuant to WAC 162-08-211(6), no findings or other parts of the commission's record of action on the complaint prior to notice of hearing shall be included in the record of the tribunal hearing unless the particular document is offered and admitted into evidence.

(4) **Custody.** The clerk shall keep custody of the official record of the tribunal hearing as provided in WAC 162-04-026 [162-08-026] (3)(h) and shall keep the tribunal file separate from the file of the original complaint, investigation, and conciliation, of which the clerk has custody under WAC 162-04-026 [162-08-026] (3)(d) and 162-08-190.

(5) **Record for appeal or enforcement.** The record certified to the court for the purpose of judicial review under RCW 34.04.130 or enforcement under RCW 49.60.260 shall include the record of the tribunal hearing plus all motions for removal of tribunal members for cause under WAC 162-08-215 and motions objecting to the panel under WAC 162-08-217, and all other papers filed because of such motions.

[Order 35, § 162-08-231, filed 9/2/77; Order 7, § 162-08-231, filed 1/19/68.]

WAC 162-08-241 Form of papers filed with tribunal. (1) **Caption.** The notice of hearing shall include a full caption in substantially the following form:

Before the Washington State Human Rights Commission Hearing Tribunal

Washington State Human Rights Commission, presenting the case in support of the complaint of James Doe,

v.

Roe Enterprises, Inc., Phyllis Roe, President, and Richard Roe, Secretary.

No.

Papers filed thereafter may have a short caption in substantially the following form:

Before the Washington State Human Rights Commission Hearing Tribunal

Washington State Human Rights Commission *ex rel.* Doe

v.

Roe Enterprises, Inc., *et al.*

No.

(2) **Form in general.** Papers filed with a tribunal shall be in the form used for superior court practice. See in particular Rule 10, civil rules for superior court.

(3) **Signing.** Every pleading, motion or other paper filed on behalf of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall similarly date and sign proceedings, motions and other papers and give the party's address. The signature of a party or of an attorney constitutes a certificate by that person that the person has read the pleading, motion, or other paper; that to the best of the person's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion, or other paper is not signed or is signed with intent to defeat the purpose of this rule it, or the appropriate part of it, may be stricken as sham and false and the hearing may proceed as though the pleading or other paper, or part, had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

[Order 35, § 162-08-241, filed 9/2/77; Order 7, § 162-08-241, filed 1/19/68.]

WAC 162-08-251 Answer. (1) **Required.** Every respondent shall file an answer to the amended complaint attached to the notice of hearing, and to any subsequent amendments or complaints that are filed.

(2) **Content.** The answer shall set out and assert every defense, in law or fact, to the claims of the complaint being answered.

(3) **Waiver of defenses not pleaded.** Defenses not pleaded in an answer are waived.

(4) **Time for filing.** An answer shall be filed within twenty days after notice of hearing is served, unless the date of hearing is less than 40 days from the date when notice of hearing is served, in which event an answer must be filed within half of the intervening time. *Example:* If the date of hearing is 25 days after the notice is served, the answer must be filed by the close of the 13th day after the notice is served.

(5) **Form of defenses and denials.** A respondent shall state in short and plain terms its defenses to each claim asserted and shall admit or deny the averments of the amended complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an averment, the respondent shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a respondent intends in good faith to deny only a part or a qualification of an averment, the respondent shall specify so

much of it as is true and material and shall deny only the remainder.

(6) **Affirmative defenses.** A respondent who wishes to raise any matter constituting an avoidance or affirmative defense, including those required to be set forth affirmatively by CR 8(c), must plead the matter as an affirmative defense in the respondent's answer. Among the matters which must be pleaded as affirmative defenses are the following:

(a) A bona fide occupational qualification;

(b) Business necessity that justifies a practice that has a discriminatory effect; and

(c) That another statute or rule of law precludes or limits enforcement of the law against discrimination, or regulations or precedents of the commission.

(7) **Statutory steps.** Any defense that the hearing cannot be held because the respondent has been prejudiced because statutory steps prior to hearing have not been taken, or because of some irregularity in statutory procedure, must be pleaded in the answer by specific negative averment, which shall include such supporting particulars as are within the answering respondent's knowledge or could reasonably have been learned by the answering respondent.

(8) **Obligation of good faith.** The assertion of denials and defenses is subject to the obligation of good faith set out in WAC 162-08-241(3).

(9) **Reply.** Unless the tribunal orders that a reply to an answer be filed, none shall be necessary. Averments in an answer shall be deemed denied or avoided.

[Order 35, § 162-08-251, filed 9/2/77; Order 7, § 162-08-251, filed 1/19/68.]

WAC 162-08-261 Complainant's participation. (1) **Notice of independent appearance.** A complainant who desires to submit testimony or otherwise participate in the hearing as a party and not to leave the case in support of the complaint to be presented solely by counsel for the commission, must serve and file a notice of independent appearance within ten days after the notice of hearing is served on that complainant. The notice shall state the address where notices to the complainant shall be sent and it shall state whether the complainant elects to prove additional charges as provided in paragraph (2) of this rule.

(2) **Election to prove additional charges.** A complainant who has filed a notice of independent appearance stating an intention to do so may at the hearing offer proof of averments included in the original complaint or in amendments to the original complaint made by the complainant, whether or not the averments are included in the amended complaint under which counsel for the commission is proceeding. For purposes of this section, the complainant may amend the original complaint without regard to intervening amendments made by the commission. The complainant may serve and file an amended complaint with a notice of independent appearance, or thereafter as provided by these rules. If no amended complaint is served with a notice of independent appearance that states an intention to prove additional charges, the clerk shall promptly place the

original complaint in the file for the hearing tribunal. Nothing done by the complainant under this rule shall place any duty on counsel for the commission to seek to prove matters not averred in the amended complaint accompanying the notice of hearing, or subsequent amendments by the commission.

(3) **Appearance without election.** If the complainant files a notice of independent appearance which does not state that he or she elects to prove additional charges, then the complainant's participation in the hearing shall be confined to the matters raised by the amended complaint filed with the notice of hearing, and subsequent amendments made by the commission.

(4) **When no independent appearance.** If the complainant does not file a notice of independent appearance as provided by this rule, the case in support of the complaint shall be presented solely by counsel for the commission.

[Order 35, § 162-08-261, filed 9/2/77; Order 7, § 162-08-261, filed 1/19/68.]

WAC 162-08-265 Amendment of pleadings. (1) **Right to amend.** A party to a tribunal hearing may amend a pleading once as a matter of course at any time more than twenty days before the date set for hearing. Otherwise, a party may amend a pleading only by leave of the chairperson of the tribunal or by written consent of all adverse parties.

(2) **Action on motions to amend.** The chairperson of the tribunal shall freely give leave to amend when justice so requires. The chairperson may designate a time for filing an answer to amended pleadings that may be answered, and may reschedule other dates, including the hearing date, if this is necessary to assure that issues for hearing are fully and properly framed.

(3) **Form of amendment.** An amendment other than one made on the record during a hearing must be in writing. A written amendment may be in the form of either a revised pleading superseding the entire text of the amended pleading, or a supplemental paper containing only the amendment.

[Order 35, § 162-08-265, filed 9/2/77.]

WAC 162-08-268 Voluntary dismissal. (1) **Prior to day of hearing.** Prior to the day when the hearing of a case commences the commission or any other party on the side supporting the complaint may voluntarily dismiss the party's case or a claim by serving and filing a written notice of dismissal.

(2) **After hearing commenced.** After a hearing has commenced the commission or any other party on the side supporting the complaint may move for voluntary dismissal of the party's case or a claim. A motion that is made before the party rests at the conclusion of its opening case shall be granted as a matter of right. A motion made after that time may be granted if good cause is shown, and the grant may be subject to such terms and conditions as the tribunal deems proper.

(3) **Effect of dismissal.** A voluntary dismissal concludes the tribunal proceeding as to the dismissed party or claim, but is not an adjudication of the merits of the

issues before the tribunal (that is, the merits may still be adjudicated in another forum if the party has a right to sue in the other forum). A voluntary dismissal of one claim does not extinguish any other claim, and a voluntary dismissal by one party does not dismiss any other party. If the commission takes a voluntary dismissal of the case in support of the complaint the entire case is closed, unless the complainant has appeared independently under WAC 162-08-261 or another person has intervened as a party on the side of the complaint pursuant to WAC 162-08-288(4), in which circumstance the hearing shall proceed with the remaining parties.

[Order 35, § 162-08-268, filed 9/2/77.]

WAC 162-08-271 Motions outside of hearing. (1) **Scope of section.** This section governs all motions made to the chairperson of the commission or of a tribunal except those made orally on the record during a hearing or other public session.

(2) **Form.** A motion must be in writing. It must state the order or other relief requested and the grounds for the motion. It may be accompanied by affidavits. It must be supported by legal authorities, set out in the motion or in a supporting brief.

(3) **Answering statements.** Any party may serve and file an answering statement within five days after the motion has been served on that party.

(4) **Filing.** The original and four copies of every motion and answering statement, with supporting papers, must be filed with the clerk, along with proof of service.

(5) **Ruling.** When the chairperson has received answering statements from all parties, or five days have elapsed since the last party was served, the chairperson shall rule on the motion without oral argument, unless the chairperson, in his or her discretion, orders that argument be heard.

(6) **Examiner for chairperson of the commission.** The chairperson of the commission in his or her discretion may appoint a hearing examiner to analyze a particular motion and to hear argument on it, if argument is ordered, and to make a proposal for decision. The hearing examiner may be a member of the commission or a lawyer or other person educated in the law. The examiner's proposal for decision shall be served on all parties and every party shall have seven days to serve and file exceptions and written argument before the chairperson makes the final ruling.

(7) **Tribunal review.** Review by a hearing tribunal of rulings of its chairperson is governed by WAC 162-08-275.

(8) **Summary judgment.** Special rules for motions for summary judgment are set out in WAC 162-08-282.

[Order 35, § 162-08-271, filed 9/2/77; Order 7, § 162-08-271, filed 1/19/68.]

WAC 162-08-275 Powers of tribunal chairperson.

(1) **General management.** The tribunal chairperson shall have the power to convene the tribunal in public or private session as needed, assign tasks to tribunal members, establish deadlines for the completion of tasks by tribunal members, and generally to see that the tribunal

functions in an orderly and prompt manner. All actions of the chairperson under this paragraph are subject to the consent of the other tribunal members, and their consent is presumed unless a member objects promptly after the chairperson acts. If a member objects, the chairperson shall put the proposed action to vote of the entire tribunal.

(2) **When tribunal is in public session.** When the tribunal is in public session the chairperson shall preside, maintain order, regulate the course of the hearing, administer oaths, and rule on procedural and evidentiary matters. Rulings of the tribunal shall be announced by the chairperson except where these rules provide otherwise or where the chairperson or tribunal authorizes or directs another member to speak in addition to or instead of the chairperson. Any member of the tribunal (but no other person) may request that a ruling of the chairperson be voted on by the full tribunal. The chairperson shall then submit the matter to an informal vote of the tribunal, off the record, after such informal discussion among tribunal members, off the record, as tribunal members desire. The chairperson shall then announce the tribunal's ruling, on the record.

(3) **When the tribunal is in nonpublic session.** When the tribunal is in nonpublic session for deliberation or other purposes, the chairperson shall preside.

(4) **When the tribunal is not in session.** When the tribunal is not in session the chairperson shall have power to receive, consider, and issue the tribunal's ruling on any motion or other procedure except one which, if granted, would dispose of the case. The chairperson shall consult by telephone or otherwise with the other tribunal members before making the ruling and shall put the matter to vote upon request of any tribunal member. The ruling shall be in writing, or, if announced orally, shall be promptly put into writing, and shall be promptly given to the other tribunal members, along with copies of written materials considered by the chairperson. The chairperson shall arrange for full tribunal action on motions for summary judgment and other motions or procedures, which, if granted, would dispose of the case.

[Order 37, § 162-08-275, filed 10/27/77; Order 35, § 162-08-275, filed 9/2/77.]

WAC 162-08-278 Powers and procedures of hearing tribunal. (1) **Generally.** All powers of the hearing tribunal which are not permitted by these rules to be exercised initially by the chairperson of the tribunal are to be exercised by the tribunal.

(2) **Informal action.** Except when the tribunal is in public session, it may meet at any time and place, or it may confer and act by telephone, letter, or other means, without coming together physically.

(3) **Authentication of action.** A writing signed by the chairperson of the tribunal shall be prima facie evidence of tribunal action, except for final orders, findings of fact, and conclusions of law, which are governed by WAC 162-08-301.

(4) **Requirements for action.** Unanimity is not required. Action agreed upon by two members is action of the tribunal.

(5) **Vacancies.** Vacancies in a tribunal shall ordinarily be filled as provided in WAC 162-08-211, but the hearing may proceed with two members, if, in the judgment of the chairperson of the commission, a substantial amount of work would have to be repeated because of the presence of a new person on the tribunal. When a tribunal has only two members, the agreement of both members shall be necessary for tribunal action.

(6) **Powers of tribunal.** The powers of the tribunal are set out in RCW 49.60.250 and in the Administrative Procedure Act, RCW 34.04.090, 34.04.100, and 34.04.105, and in this chapter, 162-08 WAC.

(7) **Duty to follow the law.** In determining whether unfair practices have been committed, the hearing tribunal shall apply the law as it is written in chapter 49.60 RCW and as it has been interpreted by final decisions of appellate courts and by the Washington state human rights commission in regulations, declaratory rulings, and other formal interpretations made by vote of the commissioners. Court decisions interpreting statutes other than chapter 49.60 RCW, rulings of other hearing tribunals, interpretations of law by the commission's staff or legal counsel, and arguments of legal counsel for the commission or other parties shall be given whatever persuasive weight they possess, in the judgment of the tribunal.

[Order 35, § 162-08-278, filed 9/2/77.]

WAC 162-08-282 Summary judgment. (1) **Authorized.** At any time prior to the tenth day before the date of a hearing, any party may serve and file a motion for summary judgment in the party's favor as to all or part of the case.

(2) **Procedure.** The usual procedure for motions made outside of hearing, WAC 162-08-271, shall apply except where this section provides a different procedure.

(3) **Response.** Any party may serve and file opposing affidavits and an answering statement, or either of these, within ten days after the motion for summary judgment has been served on that party.

(4) **Action by full tribunal.** Motions for summary judgment shall be decided by the full tribunal.

(5) **When decided.** The tribunal shall decide a motion for summary judgment promptly after ten days have elapsed since the motion was served and filed on all other parties.

(6) **Oral argument optional.** Oral argument shall be heard only if ordered by the tribunal.

(7) **What is decided.** The tribunal's final order shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, and other documents and evidence properly before the tribunal, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of whether an unfair practice has been committed although there is a genuine issue as to the amount or nature of relief to be ordered. Otherwise, summary judgment shall be denied.

(1986 Ed.)

(8) **Orders when case not fully adjudicated on motion.** If summary judgment is not ordered for the whole case or for all of the relief asked and a hearing is necessary, the tribunal shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The tribunal may summon counsel for all parties and interrogate them for this purpose. The tribunal shall then make an order specifying the facts that appear without substantial controversy, including the extent to which the amount or nature of relief is not in controversy, and directing such further proceedings as are just. At the hearing, the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

(9) **Form of affidavits; further testimony.** Supporting and opposing affidavits must be made on personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to what is stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or served with it. The tribunal may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(10) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the tribunal may refuse the motion, or it may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or the tribunal may make such other order as is just.

(11) **Affidavits made in bad faith.** Should it appear to the satisfaction of the tribunal at any time that any of the affidavits were presented in bad faith or solely for the purpose of delay, the tribunal shall order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the party to incur, including reasonable attorney's fees. The tribunal shall include this order in its final order.

[Order 35, § 162-08-282, filed 9/2/77.]

WAC 162-08-284 No counterclaims or cross-claims. Since the jurisdiction of the hearing tribunal is limited to determining whether unfair practices have occurred, counterclaims and cross-claims are not in order and will not be heard.

[Order 35, § 162-08-284, filed 9/2/77.]

WAC 162-08-286 Prehearing conference. (1) **Conference.** The chairperson of the tribunal, or the tribunal, as a matter of discretion, with or without a motion from a party, may direct the attorneys for the parties to appear before the chairperson or tribunal for a conference to consider:

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

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(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses; and

(e) Other matters that may aid in the disposition of the case.

(2) **Order.** The chairperson or tribunal shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of counsel. The order when served and filed controls the subsequent course of the case, unless it is modified at the hearing to prevent manifest injustice.

[Order 35, § 162-08-286, filed 9/2/77.]

WAC 162-08-288 Parties. (1) **Who are parties.** The parties to the hearing shall be the commission, through its counsel presenting the case in support of the complaint, a complainant who has filed a notice of independent appearance under WAC 162-08-261, the respondent or respondents named in the notice of hearing or an amended notice of hearing, and a person who moves to intervene and is permitted to do so by order of the chairperson of the commission.

(2) **Adding parties.** Any party may move to join an additional party or parties. The motion must be directed to the chairperson of the commission. If the motion is granted, the chairperson of the commission shall issue an amended notice of hearing showing the addition of the party or parties and making such other provisions as are appropriate for an orderly hearing.

(3) **Substituting parties.** If death, incompetency, transfer of interest, or other occurrence should make the substitution of parties necessary or desirable, the chairperson of the tribunal may make the substitution by order. The chairperson of the tribunal may act on his or her own motion, or on motion of a party or of the person asking to be substituted for a party.

(4) **Intervention.** A person claiming an interest in the subject matter of the hearing may move to intervene. The motion must be directed to the chairperson of the tribunal. The chairperson shall grant or deny the motion as a matter of discretion.

(5) **Factors considered.** The chairperson of the commission or tribunal in ruling on a motion to add a party shall be guided by whether the presence of the party will be helpful in carrying out the purposes of the law against discrimination (compare WAC 162-08-061). In addition, the chairperson shall consider whether adding the party will cause unnecessary delay or will divert the hearing from the objectives of the statute and of the commission's amended complaint. The chairperson need not follow court rules or precedents on the joinder of parties.

(6) **Not class actions.** Hearings under RCW 49.60-.250 are not class actions, in the technical sense of that term in court practice. The commission, presenting the case in support of a complaint, may ask that a respondent be ordered to pay back pay or to afford other relief

to all persons injured by an unfair practice, and the tribunal may issue such an order to carry out the purposes of the law against discrimination (WAC 162-08-298(6)). If such an order is made, the right to have the payments made will belong to the commission, not to the injured persons (WAC 162-08-305). The legal rights of persons of the class alleged to have been injured are not at issue in the case, and those persons are not bound by the tribunal's decision unless they accept the benefits of it in full satisfaction of their potential claims. Only the commission and the respondent and other persons named as parties are bound by the order of a tribunal.

[Order 35, § 162-08-288, filed 9/2/77.]

HEARING AND DECISION

WAC 162-08-291 Conduct of hearings. (1) **Reference to law.** Hearings shall be conducted in accordance with the provisions of the Administrative Procedure Act, chapter 34.04 RCW, RCW 49.60.250, and these rules.

(2) **Chairperson presides.** The chairperson of the tribunal shall preside as provided in WAC 162-08-275(2).

(3) **Hearings shall be public.** All tribunal hearings shall be open to the public. Photographs and recordings of the proceedings may be made, subject to such conditions as the chairperson may impose to prevent interference with the orderly conduct of the hearing. Special lighting for photographic purposes may be used only if the chairperson has determined in advance that it will not be distracting. The chairperson may order news media to use one or more television cameras on a pooling basis if the number of cameras interferes with the conduct of the hearing.

(4) **Record of testimony.** The clerk shall determine whether the record of testimony taken at a hearing shall be made by mechanical means or by a court reporter.

(5) **Copies of record.** When the record has been made by the commission's staff, rather than by a court reporter, a party ordering a copy of the record or part thereof under RCW 34.04.090(5) must pay the reasonable cost of transcription, as determined by the clerk, in advance of delivery of the copy. This paragraph shall not apply to transcription of the record for purposes of appeal (the superior court will fix and assess the cost of preparation of the record on appeal).

[Order 38, § 162-08-291, filed 10/27/77; Order 35, § 162-08-291, filed 9/2/77; Order 7, § 162-08-291, filed 1/19/68.]

WAC 162-08-292 Evidence. (1) **General rules on admissibility.** Hearing tribunals shall admit and give probative effect to evidence that is admissible in the superior courts of the state of Washington in a nonjury trial, or that is admissible under the Federal Rules of Evidence. In addition, tribunals may admit and give probative effect to other evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Tribunals shall give effect to the rules of privilege recognized by law.

Tribunals may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. In general, tribunals shall admit on a nontechnical basis all evidence that will be practically helpful in deciding the case or evaluating other evidence, and (except for privileged material) shall exclude evidence only if it will not be practically helpful or will lead off into side issues that would unduly prolong the case if they were tried.

(2) **Identification of exhibits.** All exhibits requested by any party shall be identified by a single series of numbers, in the order that the proposed exhibits are marked for identification. The numbers may be preceded by code letters indicating the acting party, including "C" for the commission, and "R" for a respondent. *Example:* The first exhibit, marked at the request of the commission, is C1. The second exhibit, if offered by a respondent, is R2, whether or not C1 was admitted.

(3) **Stipulations encouraged.** Counsel are requested to mark proposed exhibits in advance of hearing and to stipulate to the admission of all exhibits that will not be objected to.

(4) **Copies of documents and exhibits.** Unless excused from doing so by the chairperson of the tribunal, a party offering a document or other exhibit in evidence must furnish copies to all other parties and file five copies.

(5) **Official notice.** The hearing tribunal may take notice of judicially cognizable facts, and in addition may take notice of general, technical, or scientific facts within the specialized knowledge of its members. Any party may, by motion, ask the tribunal to take official notice of facts or material. When the tribunal takes official notice of any facts or material, the chairperson of the tribunal must notify the parties of what is noticed and afford them reasonable opportunity to contest the noticed facts. This may be done at any time before the tribunal's order becomes final.

(6) **Evaluation of evidence.** The tribunal's findings of fact shall be based exclusively on the evidence and on matters officially noticed, but the tribunal members may utilize their experience, technical competence, and specialized knowledge in evaluating the evidence.

(7) **Efforts at conciliation excluded.** Any endeavors or negotiations for conciliation made under RCW 49.60-.240 shall not be received in evidence as proof of whether or not an unfair practice was committed. If a respondent denies that the statutory step of endeavoring to eliminate the unfair practice by conference, conciliation, and persuasion took place, then evidence of whether such endeavors were made may be admitted, but the contents and details of offers, counteroffers, and discussions shall be excluded to the maximum extent possible. The commission's findings made pursuant to RCW 49.60.240 are prima facie evidence that the investigation, conciliation, and other statutory steps have been taken. In addition, offers of settlement or compromise and statements made in settlement or compromise negotiations, at any stage of the case, are privileged from use as proof of whether or not an unfair practice was committed. Evidence of such an offer or statement shall be excluded upon claim of the privilege by the party that made the offer or statement.

(1986 Ed.)

[Order 35, § 162-08-292, filed 9/2/77.]

WAC 162-08-294 Claims of self incrimination—Immunity. (1) **How claimed.** A natural person who is testifying under oath, may, instead of answering a question, decline to answer the question on the ground that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a penalty or forfeiture.

(2) **Procedure before compelling testimony.** Before compelling testimony after the privilege against self incrimination has been invoked (and thereby exempting the witness from prosecution) the chairperson of the tribunal shall ask examining counsel and also counsel for the commission to state their positions on whether the witness should be ordered to answer. Counsel for the commission may ask that the ruling be deferred for such time as is necessary for counsel for the commission to consult with other public officers before responding. The position of counsel for the commission and other public officers shall be given due weight by the chairperson or tribunal in deciding whether to order the witness to answer.

(3) **Inference from silence after immunity acquired.** If the witness declines to answer the question after acquiring exemption from prosecution, the hearing tribunal may consider the silence as evidence and may draw such inferences from it as are warranted by the facts surrounding the incident.

[Order 35, § 162-08-294, filed 9/2/77.]

WAC 162-08-295 Consultation on issues. Hearing tribunal members shall not consult with anyone other than other members of the tribunal on any issue of fact or law to be decided by them in the case, except:

(1) On notice and opportunity for all parties to be present;

(2) In writing with copies to all parties;

(3) To the extent required for the disposition of ex parte matters as authorized by law;

(4) For personal assistants or employees of the commission who have not participated in the case in any manner, who are not engaged for the commission in any investigative functions in the same or any current factually related case, and who are not engaged for the commission in any prosecutory functions, as provided in RCW 34.04.115.

[Order 35, § 162-08-295, filed 9/2/77.]

WAC 162-08-296 Default by respondent. (1) **Finding of default.** If a respondent fails to appear, answer, or otherwise defend, or, having appeared or answered, does not present evidence or otherwise defend the case at the hearing, the tribunal shall find the respondent to be in default and shall find the facts alleged in the amended complaint to be true.

(2) **When answer or defense permitted after motion for default.** A respondent may answer or defend after a pre-hearing motion for default has been served and filed, and if the respondent shows by answering statement that

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it is then in compliance with the rules, the motion for default shall be denied.

(3) **No defense after default.** A respondent may not answer or defend after the tribunal has found the respondent to be in default, unless the respondent obtains relief under WAC 162-08-013 or subsection (5) of this section.

(4) **Order when default.** Upon finding a respondent to be in default, the tribunal shall order the respondent to do the things requested as relief in the amended complaint of the commission (and of the complainant, if the complainant has proceeded independently) or to do such of those things as the tribunal finds are appropriate on the basis of the information before it. The tribunal may receive evidence for the purpose of determining appropriate relief.

(5) **Setting aside default order.** A party against whom an order has been issued by default may, within ten days after the date when the party was served with the order, move to set aside the order and finding. A motion to set aside a default order shall be granted only if the motion and supporting affidavits show that the party has a reasonable excuse for not appearing or defending, or if it would be clearly unjust to hold the party to the order.

[Order 35, § 162-08-296, filed 9/2/77.]

WAC 162-08-298 Remedies. (1) **Power of tribunal.** The tribunal has the power to exercise the general jurisdiction of the commission to eliminate and prevent discrimination by means of orders to respondents who have been found after hearing to have engaged in an unfair practice or practices.

(2) **General objectives.** An order should generally both eliminate the effects of an unfair practice and prevent the recurrence of the unfair practice. The effects of an unfair practice are eliminated by restoring the victims of the unfair practice as nearly as possible to the position they would have been in if the unfair practice had not occurred. It is appropriate to eliminate the effects of the unfair practice on persons other than the complainant or complainants, and to consider the deterrent effect of an order on persons other than the respondent or respondents. The objective of the law is to eliminate and prevent discrimination, not merely to provide treatment for victims of discrimination.

(3) **Cease and desist.** In every case where the tribunal finds that a respondent has engaged in an unfair practice the tribunal shall order the respondent to cease and desist from that unfair practice.

(4) **Examples of remedies.** Included among remedies that will effectuate the purposes of the law against discrimination in an appropriate case are the following:

(a) An order to hire persons who have been unfairly denied employment;

(b) An order to reinstate persons who have been unfairly terminated, downgraded, or reclassified;

(c) An order to upgrade persons who have been unfairly denied promotion;

(d) An order to pay back pay to a person or persons who would have had a job but for the unfair practice of the respondent;

(e) An order to pay an amount equal to the difference in pay between the job the persons had and the job they would have had but for the unfair practice of the respondent;

(f) An order restoring employment benefits, such as insurance benefits, retirement contributions, sick leave, vacation benefits, seniority standing, etc., lost or not gained because of an unfair practice;

(g) An order to admit persons to membership in a union which has unfairly excluded the persons;

(h) An order to merge or otherwise restructure a seniority system that unfairly disadvantages a protected class of persons;

(i) An order to rent or sell real property to persons who have been unfairly denied the property;

(j) An order to grant credit to persons who have been unfairly denied credit;

(k) An order to reimburse or compensate persons for the excess cost of credit caused by an unfair practice;

(l) An order to issue or renew insurance to persons who have been unfairly denied the insurance;

(m) An order to pay a sum of money to compensate persons for humiliation and mental suffering caused by an unfair practice;

(n) An order to pay a sum of money up to \$1000 to a complainant who has been denied the right to be free from discrimination in a real property transaction, based simply on the loss of the right (RCW 49.60.225);

(o) An order to pay interest on money that should have been paid at an earlier time, but for the unfair practice. Interest may be calculated at the current market rate for unsecured personal loans from institutions other than small loan companies licensed under chapter 31.08 RCW;

(p) An order to not retaliate against a complainant, witness, or other person for filing a complaint, testifying, or assisting in a case;

(q) An order to institute affirmative programs, practices, or procedures that will eliminate an unfair practice or its effects, or will prevent the recurrence of the unfair practice;

(r) An order for any other remedy which is available under comparable civil rights laws of the United States or other states.

This list is not exhaustive. A tribunal may make any order that will effectuate the purposes of the law against discrimination, that is in compliance with the rules of the commission, and that is not otherwise prohibited by law.

(5) **Remedies not authorized.** A hearing tribunal is not authorized to order:

(a) The payment of punitive damages;

(b) The payment of fines payable to the state.

(6) **Treatment of unemployment compensation.** When an order is made for payment of wages lost during a time when the beneficiary of the order was receiving unemployment compensation, the amount of the award shall not be reduced by the amount of unemployment compensation received. The order may make provision for payment of the portion of the award covered by unemployment compensation jointly to the beneficiary and

the Washington state department of employment security, or to the department alone. (Under Washington law, it is the duty of the employee to reimburse the department of employment security when back pay is received for a period during which the employee collected unemployment compensation.)

(7) **Burden of proof of noninjury from unfair practice.** When a showing has been made that a respondent has committed an unfair practice with respect to a person, but the respondent contends that nevertheless the person did not lose pay or other benefits because the person would not have been hired, granted credit, etc., for reasons other than the unfair practice, the burden is on the respondent to prove that the person would not have received the pay, credit, etc., for the other reasons.

(8) **Persons for whom relief can be ordered.** The tribunal may order that remedies for an unfair practice be paid or accorded to the named complainant or complainants, and, in addition, to any other persons, identified or unidentified, who have been injured by the unfair practice. The tribunal may prescribe formulas for ascertaining the remedy for unknown victims, and may order the respondent to take actions to identify and find the unknown victims. An order for relief to all of the victims of an unfair practice does not convert the case into a class action (WAC 162-08-288(6)).

(9) **Nature and purpose of order.** A tribunal order is one means of carrying out the public purpose of the law against discrimination: To eliminate and prevent certain discrimination. The tribunal in framing its order shall be guided by this public purpose. The tribunal's task is not the determination of private rights. See WAC 162-08-061, 162-08-062. The tribunal is not required to observe conventional common law or equity principles in fashioning its order. The guiding principle for the tribunal is whether a particular remedy will effectuate the purposes of the law against discrimination. An order requiring a respondent to pay money to a person as back pay, or to compensate for some other loss, is not a private award of damages, but is a public reparation order. Only the commission can enforce the order. The beneficiary has no property right in the money until he or she receives it. See WAC 162-08-305.

(10) **Retention of jurisdiction.** In appropriate cases the tribunal in its order may retain jurisdiction for a reasonable period of time for the purpose of determining compliance with its order or issuing orders supplementing or modifying the original order. If the tribunal does not retain jurisdiction through a provision of its order the tribunal has no jurisdiction to modify or supplement its order, except on reconsideration (WAC 162-08-311). Retention of jurisdiction by the tribunal under this subsection does not prevent the tribunal's order from being final for the purpose of judicial review.

[Order 35, § 162-08-298, filed 9/2/77.]

WAC 162-08-301 Order, findings and conclusions.

(1) **Required.** In every hearing the tribunal shall set out its final decision in an order, accompanied by findings of fact, conclusions of law, and an opinion explaining the reasons for its decision.

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(2) **Disagreement among members.** When the hearing tribunal is not unanimous, the decision of two members shall control. Any member may file or announce a concurring or dissenting opinion.

(3) **Opinion.** The tribunal's opinion may be given orally on the record or it may be written. Tribunals are encouraged to retire and deliberate immediately after the hearing has been concluded and to reconvene and announce their decision on the record immediately after it has been reached, if they are able to do so.

(4) **Factual basis for decision.** Findings of fact shall be based exclusively on the evidence and on matters officially noticed. RCW 34.04.090(6). In determining the case the tribunal shall not consider factual information that is not made a part of the record of the case. RCW 34.04.100(2).

(5) **Drafting findings, conclusions, and order.** Unless the tribunal reserves the task to itself, counsel for the prevailing party shall prepare a draft of findings of fact, conclusions of law, and an order. If counsel for the prevailing party has not served and filed the draft within 15 days after the tribunal has announced or served and filed its opinion, then counsel for any party may do so. The draft, whether prepared by counsel or the tribunal itself, shall be served on all parties and on the clerk for transmittal to all tribunal members. Any counsel for a party and any party not represented by counsel may serve and file written comments, objections, or alternative drafts within ten days after being served with the original draft. After the expiration of the ten day period for all parties, the tribunal shall consider the original draft and all comments, objections and alternative drafts and shall sign and file its findings of fact, conclusions of law, and order.

(6) **Form of findings of fact.** The findings of fact shall consist of a concise statement of each fact found upon each contested issue of fact. RCW 34.04.120.

(7) **Notice of order.** The clerk shall deliver or mail a copy of the order, findings of fact, and conclusions of law to each party and to each attorney of record for a party. RCW 34.04.120.

[Order 35, § 162-08-301, filed 9/2/77; Order 7, § 162-08-301, filed 1/19/68.]

WAC 162-08-305 Nature of orders--Enforcement.

(1) **Nature of orders.** Orders obtained by counsel for the commission are public reparation orders, not adjudications of private rights between respondents and persons aggrieved by the respondents' unfair practices. When a respondent is ordered to rehire or compensate a person, the person who is the beneficiary of the order has no property right in the job, money, etc., until the person receives it.

(2) **Enforcement of order.** Only the commission, through its counsel, has the authority to enforce an order of a hearing tribunal. RCW 49.60.260.

(3) **Compromise of order.** The commission, acting in good faith, may compromise an order of a hearing tribunal, with or without the consent of the beneficiaries of the order.

[Order 35, § 162-08-305, filed 9/2/77.]

WAC 162-08-311 Reconsideration. (1) **Motion.** Within ten days after being served with the final order of a tribunal, any party may serve and file a motion for reconsideration. The motion shall identify the points that the party desires to have reconsidered and shall fully state the reasons for reconsideration. The motion shall in all other respects proceed as provided in WAC 162-08-271.

(2) **Finality for appeal.** When a motion for reconsideration has been filed, the order of the tribunal shall not be deemed final for purposes of appeal until the ruling on the motion has been served.

(3) **Reconsideration not necessary for appeal.** Motions for reconsideration should be made only when a party feels that the tribunal has overlooked or misunderstood something. It is not necessary to file a motion for reconsideration in order to appeal.

[Order 35, § 162-08-311, filed 9/2/77; Order 7, § 162-08-311, filed 1/19/68.]

RULE MAKING

WAC 162-08-600 Requests for advance notice of rule making. (1) **Form.** Requests for advance notice of rule making proceedings, as provided in RCW 34.04-.025, shall be in writing and shall give the name of the requesting person or organization, and the address to which the notice is to be sent.

(2) **Duration.** Requests for advance notice of rule making proceedings will be honored for a period of three years after the date of the request, and may be renewed by written notice to the commission containing the information required for the original request.

(3) **Where filed.** Requests for advance notice of rule making proceedings should be filed at the Olympia office of the commission, attention legal division.

[Order 35, § 162-08-600, filed 9/2/77; Order 7, § 162-08-600, filed 1/19/68.]

WAC 162-08-610 Petitions for rule making. Petitions to the commission for the promulgation, amendment, or repeal of a rule under RCW 34.04.060 shall include a statement of the reasons for the requested action, and may be accompanied by a brief of any applicable law. Petitions for the promulgation of a rule shall set out the full text of the proposed rule. Petitions for the amendment of a rule shall identify the rule by its WAC number, and shall contain the complete text of the rule as proposed to be amended, showing additions by underlining the new words and showing deletions by marking them over with a dotted line. Petitions for repeal of a rule shall identify the rule by WAC number, and may quote its text.

[Order 35, § 162-08-610, filed 9/2/77; Order 7, § 162-08-610, filed 1/19/68.]

WAC 162-08-621 Consideration of economic values. (1) **Required.** In compliance with the state economic policy, chapter 43.21H RCW, the commission will give appropriate consideration to economic values along with other factors when it considers the adoption of rules.

(2) **Staff analysis and report.** The commission's staff shall analyze the expected economic effect of a proposed rule and make a written report summarizing its analysis and conclusions. The report shall be completed sufficiently in advance of commission action to permit study by the commissioners and other interested persons.

(3) **Report available for inspection.** The clerk shall keep the staff report available for inspection and copying during office hours.

(4) **Other information.** Any person may file or orally present additional economic analysis in the manner provided for comments on the rules in the notice of intention to adopt, amend, or repeal rules. The commission will consider all the information that it receives.

[Order 35, § 162-08-621, filed 9/2/77.]

DECLARATORY RULINGS

WAC 162-08-700 Declaratory rulings. (1) **Contents of petition.** A petition for a declaratory ruling under RCW 34.04.080 shall contain the following:

(a) A statement of the question on which the declaratory ruling is sought;

(b) A full statement of the facts giving rise to the question;

(c) A statement of the basis for the petitioner's interest in the question.

(2) **Form.** A petition for a declaratory ruling may be in any form, including the form of a letter or a pleading.

(3) **Where filed.** Petitions for declaratory rulings shall be filed with the clerk.

(4) **Confirmation, investigation.** In order to determine the full facts giving rise to the question the executive secretary may require the petitioner to submit additional information, and may make an independent investigation.

(5) **Consideration and disposition.** The commissioners will:

(a) Issue a nonbinding declaratory ruling;

(b) Notify the petitioner that no declaratory ruling will be issued; or

(c) Set a time and place for hearing argument or evidence on the question, notify the petitioner of them, and issue either a binding or nonbinding declaratory ruling after the hearing.

(6) **Revocation or revision.** A declaratory ruling may be revoked or revised at any time by vote of the commissioners at a meeting. The revocation or revision shall not be effective as to the person who requested the declaratory ruling until that person has notice of the revocation or revision.

(7) **Supersedure.** A declaratory ruling is automatically superseded, without need for notice, by any material change in the statutes, or by a decision of the Washington supreme court or court of appeals that is contrary to the declaratory ruling.

(8) **Reliance.** When any person has relied in good faith on a declaratory ruling of the commission, the commission will not thereafter assert a contrary position

against that person, unless the declaratory ruling is revoked, revised, or superseded under subsection (7) of this section. This paragraph (8) covers persons other than the person to whom the declaratory ruling was issued, if the persons have justifiably relied on the declaratory ruling.

(9) **Use of examiner.** The commissioners may direct that a hearing for the purpose of issuing a declaratory ruling shall be held before a member of the commission, or a panel of members of the commission, or a hearing examiner. The member, panel, or examiner shall hear testimony and argument, receive exhibits and other testimony, evaluate the material, and make a proposal for decision by the commissioners, to be considered and decided in the manner provided in RCW 34.04.110.

[Order 37, § 162-08-700, filed 10/27/77; Order 35, § 162-08-700, filed 9/2/77.]

**Chapter 162-12 WAC
PREEMPLOYMENT INQUIRY GUIDE**

WAC

| | |
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DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

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| 162-12-020, | 162-12-030, 162-12-040. [Guide (part), filed 10/22/62.] Repealed by Rule, filed 10/23/67, § 162-12-910. |
| 162-12-050 | Preemployment inquiry guide—Bona fide occupational qualification. [Guide (part), filed 10/22/62.] Repealed by Order 8, filed 6/22/70. |
| 162-12-060 | Preemployment inquiry guide—Petitioning for a bona fide occupational qualification exemption. [Guide (part), filed 10/22/62.] Repealed by Order 8, filed 6/22/70. |
| 162-12-070 | Preemployment inquiry guide—Exemptions based on government security regulations or directives of other government agencies. [Guide (part), filed 10/22/62.] Repealed by Order 8, filed 6/22/70. |
| 162-12-080 | [Rule, filed 7/17/64; Guide (part), filed 10/22/62.] Repealed by Rule, filed 10/23/67, § 162-12-910. |

WAC 162-12-100 Purpose. (1) This regulation, which may be called the preemployment inquiry guide, is issued to inform employers, employment agencies, and the public of the interpretation given by the Washington state human rights commission to the parts of the law against discrimination which declare certain preemployment inquiries to be unfair practices.

(2) This regulation cannot cover every question which might arise in connection with inquiries prior to the employment. The commission hopes that in most cases the given rules, either directly or by analogy, will guide those who are covered by the law. Employers and employment agencies that still have questions are invited to

call the commission's staff for advice and assistance, or, if necessary, to petition the commission for a declaratory ruling under RCW 34.04.080 and WAC 162-08-620 [162-08-700] on the application of the law to particular facts.

[Order 16, § 162-12-100, filed 5/22/74; Order 9, § 162-12-100, filed 9/23/71; § 162-12-100, filed 10/23/67.]

WAC 162-12-110 Statutes interpreted. This regulation is intended to carry out the purposes of the law against discrimination as stated generally in RCW 49.60.010 and 49.60.030, and to interpret and make more specific the following parts of the law:

RCW 49.60.180:

"It is an unfair practice for any employer:

"(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language."

RCW 49.60.200:

"It is an unfair practice for any employment agency to . . . use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination as to age, sex, race, creed, color, or national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language."

[Order 16, § 162-12-110, filed 5/22/74; Order 9, § 162-12-110, filed 9/23/71; § 162-12-110, filed 10/23/67.]

WAC 162-12-120 Rationale and policy. (1) The portions of RCW 49.60.180 and 49.60.200 quoted in WAC 162-12-110 forbid preemployment inquiries which convey to the applicant the impression that persons in a protected class will be discriminated against. Inquiries which would convey this impression to a reasonable person are prohibited whether or not they are made in connection with a discriminatory purpose.

(2) The Washington state human rights commission recognizes that an employer's interest in the race, etc., of the applicants may be consistent with the purposes of the law against discrimination, as where the employer wants

to see whether his or her employment office or employment agency is properly carrying out the employer's policy of nondiscrimination. The commission at the same time recognizes that in the absence of safeguards records of race, etc., can easily be misused. Taking both of these facts into account, the commission has concluded that the best approach is to establish fixed rules which characterize particular preemployment inquiries as fair or not, but to draw the line so that those who intend to make proper use of data on protected classes have maximum freedom to do so.

[Order 16, § 162-12-120, filed 5/22/74; Order 9, § 162-12-120, filed 9/23/71; § 162-12-120, filed 10/23/67.]

WAC 162-12-130 Inquiries for purposes of discrimination prohibited. It is an unfair practice to make any inquiry or keep any record of race, creed, color, national origin, sex, marital status, or handicap, before, during, or after employment, for the purpose of discriminating on these grounds, unless the particular quality inquired about is a bona fide occupational qualification.

[Order 16, § 162-12-130, filed 5/22/74; Order 9, § 162-12-130, filed 9/23/71; Order 8, § 162-12-130, filed 6/22/70; § 162-12-130, filed 10/23/67.]

WAC 162-12-135 Bona fide occupational qualifications. The statutes construed in this chapter recognize an exception when inquiries are based upon a "bona fide occupational qualification." For guidance on the meaning of that term see WAC 162-16-020. The provisions of this preemployment guide do not apply where age, sex, race, creed, color, marital status, or national origin is a bona fide occupational qualification and is identified as such to the applicant or other person. See WAC 162-16-040.

[Order 16, § 162-12-135, filed 5/22/74; Order 9, § 162-12-135, filed 9/23/71; Order 8, § 162-12-135, filed 6/22/70.]

WAC 162-12-140 Preemployment inquiries. (1) The rules in the following chart of fair and unfair inquiries to job application forms, preemployment interviews, or any other type of interrogation of persons seeking to be employed. The rules also apply when the inquiries are made to persons other than the applicant or employee, and when the inquiries are made by third parties such as a credit reporting service on behalf of the employer or employment agency. The rules do not apply after a person is employed. See WAC 162-12-180.

(2) Employers and employment agencies shall observe these preemployment rules except where one or more of the following conditions exist:

- a. A "bona fide occupational qualification" as explained in chapter 162-16 WAC.
- b. An approved corrective employment program as provided for in chapter 162-18 WAC.
- c. An affirmative action plan approved or required by a government agency or competent jurisdiction.
- d. A contrary requirement of federal law, as explained in WAC 162-12-150.

If one or more of the above conditions apply, the employer or employment agency may use appropriate inquiries that would otherwise be unfair. Inquiries made under these exceptions must always be accompanied by an explanation of their purpose. See WAC 162-12-135, 162-12-170, 162-16-040, and 162-18-090.

(3) The examples in the following chart of fair and unfair preemployment inquiries are intended to define what is an unfair practice under RCW 49.60.180(4) and 49.60.200 and to have the force of law where they apply. These examples are not exhaustive, however. The statutes prohibit all preemployment inquiries which unnecessarily reveal race, sex, or membership in other protected classes, whether or not the particular inquiry is covered in this regulation.

| SUBJECT | FAIR PREEMPLOYMENT INQUIRIES | UNFAIR PREEMPLOYMENT INQUIRIES |
|---------|--|--|
| a. Age | Inquiries as to birth date and proof of true age are permitted by RCW 49.44.090. | Any inquiry not in compliance with RCW 49.44.090 which implies a preference for persons under 40 years of age. |

(For age discrimination, RCW 49.44.090 must be read in conjunction with RCW 49.60.180 and 49.60.200. It limits age discrimination coverage to persons between the ages of 40 and 65, and makes other limitations and exceptions to the age discrimination law.)

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|-----------------------------------|--|--|
| b. Arrests (see also Convictions) | None. (Law enforcement agencies are exempt for this rule. See WAC 162-16-050, discrimination in employment because of arrests.) | All inquiries relating to arrests. |
| c. Citizenship | Whether applicant is prevented from lawfully becoming employed in this country because of visa or immigration status. Whether applicant can provide proof of citizenship, visa, alien registration number after being hired. | Whether applicant is citizen. Requirement before hiring that applicant present birth certificate, naturalization or baptismal record. Any inquiry into citizenship which would tend to divulge applicant's lineage, ancestry, national origin, descent, or birthplace. |
| d. Convictions (see also Arrests) | (1) Inquiries concerning specified convictions which relate reasonably to fitness to perform the particular job(s) being applied for: <i>Provided</i> , That such inquiries be limited to convictions for which the date of conviction or prison release, whichever is more recent, is within 7 years of the date of the job application. (2) Where the employer believes, after careful | Any inquiry which does not meet the requirements for fair preemployment inquiries. |

| SUBJECT | FAIR PREEMPLOYMENT INQUIRIES | UNFAIR PREEMPLOYMENT INQUIRIES | SUBJECT | FAIR PREEMPLOYMENT INQUIRIES | UNFAIR PREEMPLOYMENT INQUIRIES |
|----------------------|---|---|--|--|--|
| | consideration, that it is not practicable to inquire about specified convictions, the employer may inquire generally about <i>all</i> convictions for which the date of the conviction or prison release, whichever is more recent, is within 7 years of the date of the job application: <i>Provided</i> , That such general inquiries be accompanied by a disclaimer informing the applicant that a conviction record will not necessarily bar him or her from employment. (Law enforcement agencies are exempt from this rule. See WAC 162-16-060 for further guidance on proper use of conviction records.) | | h. Marital Status (see also Name and Family) | None. | () Mr. () Mrs. () Miss () Ms. Whether the applicant is married, single, divorced, separated, engaged, widowed, etc. |
| | | | i. Military | Inquiries concerning education, training, or work experience in the armed forces of the United States. | Type or condition of military discharge. Applicant's experience in other than U.S. armed forces. Request for discharge papers. |
| | | | j. Name | Whether applicant has worked for this company or a competitor under a different name and, if so, what name. Name under which applicant is known to references if different from present name. | Inquiry into original name where it has been changed by court order or marriage. Inquiries about a name which would divulge marital status, lineage, ancestry, national origin or descent. |
| e. Family | Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may prevent him or her from meeting work attendance requirements. | Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements, or dependents. | k. National Origin | Inquiries into applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements. | Inquiries into applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of applicant's parents or spouse. |
| f. Handicap | Whether applicant has certain specified sensory, mental or physical handicaps which relate reasonably to fitness to perform the particular job. Whether applicant has any handicaps or health problems which may effect work performance or which the employer should take into account in determining job placement. | Over-general inquiries (e.g. "Do you have any handicaps?") which would tend to divulge handicaps or health conditions which do not relate reasonably to fitness to perform the job. | l. Organizations | Inquiry into organization memberships, excluding any organization the name or character of which indicates the race, color, creed, sex, marital status, religion, or national origin or ancestry of its members. | Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs. |
| g. Height and Weight | Inquiries as to ability to perform actual job requirements. Being of a certain height or weight will not be considered to be a job requirement unless the employer can show that no employee with the ineligible height or weight could do the work. | Any inquiry which is not based on actual job requirements. | m. Photographs | May be requested <i>after</i> hiring for identification purposes. | Request that applicant submit a photograph, mandatorily or optionally, at any time before hiring. |
| | | | n. Pregnancy (see also Handicap) | Inquiries as to a duration of stay on job or anticipated absences which are made to males and females alike. | All questions as to pregnancy, and medical history concerning pregnancy and related matters. |
| | | | o. Race or Color | None. | Any inquiry concerning race or color of skin, hair, eyes, etc. |
| | | | p. Relatives | Name of applicant's relatives already employed by this company or by any competitor. | Names and addresses of any relative other than those listed as proper. |

(While the law does not directly prohibit company policies governing the employment of relatives, any policy which has the effect of disadvantaging minorities, women, married couples, or other protected classes, would be in violation of the law unless it is shown to serve a necessary business purpose.)

| SUBJECT | FAIR PREEMPLOYMENT INQUIRIES | UNFAIR PREEMPLOYMENT INQUIRIES |
|----------------------|--|--|
| q. Religion or Creed | None. | Inquiries concerning applicant's religious denomination, religious affiliations, church, parish, pastor, or religious holidays observed. |
| r. Residence | Inquiries about address to the extent needed to facilitate contacting the applicant. | Names or relationship of persons with whom applicant resides. Whether applicant owns or rents own home. |
| s. Sex | None. | Any inquiry. |

[Order 19, § 162-12-140, filed 1/20/75; Order 18, § 162-12-140, filed 1/20/75; Order 16, § 162-12-140, filed 5/22/74; Order 9, § 162-12-140, filed 9/23/71; Order 8, § 162-12-140(1), filed 6/22/70; § 162-12-140 and chart, filed 10/23/67.]

WAC 162-12-150 Inquiries required by United States. Because of the supremacy of federal law over state law, an employer or employment agency may ask applicants to state their race, creed, color, sex, marital status, or national origin to the extent that the employer is required to do so by the United States government. When the United States government asks only for data on race, creed, color, national origin, marital status, or sex of applicants, the information shall be acquired by means other than inquiry to the applicants, unless the United States expressly requires the inquiries or unless the inquiries are made in conformity with WAC 162-12-160 and 162-12-170.

[Order 16, § 162-12-150, filed 5/22/74; Order 9, § 162-12-150, filed 9/23/71; § 162-12-150, filed 10/23/67.]

WAC 162-12-160 Data for legitimate purposes. (1) It is not an unfair practice to make inquiries as to race, creed, color, sex, marital status, national origin or handicap for purposes of affirmative action to eliminate or prevent discrimination against persons in protected classes, when the inquiries are made in the manner provided in WAC 162-12-170.

(2) Data on race, creed, color, national origin, sex, or marital status shall not be recorded on any paper which is kept in the applicant's personnel file, nor shall such data be kept in any other place where it is available to those who process the application. Records which identify the race, etc., of a particular person shall be kept confidential, except to the extent necessary to implement a corrective employment program as authorized by chapter 162-18 WAC, to permit the compilation of statistics, and to permit verification of the statistics by top management of the employer, or by the Washington

state human rights commission or other concerned governmental agencies.

[Order 18, § 162-12-160, filed 1/20/75; Order 16, § 162-12-160, filed 5/22/74; Order 9, § 162-12-160, filed 9/23/71; § 162-12-160, filed 10/23/67.]

WAC 162-12-170 Conditions for inquiries to applicants. An employer or employment agency may ask an applicant to state his or her race, creed, color, national origin, sex, marital status or handicap for a nondiscriminatory purpose, and then only if it has satisfied all of the following conditions:

(1) The employer shall have adopted a written equal employment policy which authorizes the inquiries as a means of monitoring its enforcement, and which sets out detailed procedures for keeping the responses confidential and separate from other papers relating to applicants, in fulfillment of the requirements of WAC 162-12-160(2).

(2) The form on which the question appears contains statements clearly informing the applicant of the reasons for asking for the information, the uses to which the information will be put, and the safeguards which will prevent use of the information by those who will process the application.

(3) The written policy and proposed form have been submitted to and have been approved by the executive secretary of the commission or his or her designate, or they have been required or approved by an agency of the United States government which has jurisdiction to do so.

[Order 18, § 162-12-170, filed 1/20/75; Order 16, § 162-12-170, filed 5/22/74; Order 9, § 162-12-170, filed 9/23/71; § 162-12-170, filed 10/23/67.]

WAC 162-12-180 Post employment records. RCW 49.60.180 and 49.60.200 and these rules do not prohibit making or keeping records of the race, creed, color, national origin, sex, marital status, or age of persons after they are employed, unless the records are used in connection with discrimination. To prevent improper use, records of an employee's race, creed, color or national origin should be kept separate from the employee's personnel file.

[Order 16, § 162-12-180, filed 5/22/74; Order 9, § 162-12-180, filed 9/23/71; § 162-12-180, filed 10/23/67.]

**Chapter 162-16 WAC
EMPLOYMENT**

| WAC | |
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| 162-16-020 | Bona fide occupational qualification defined. |
| 162-16-030 | Advice of commission. |
| 162-16-040 | Identification in use. |
| 162-16-050 | Discrimination in employment because of arrests. |
| 162-16-060 | Discrimination in employment because of convictions. |
| 162-16-070 | Applicability of WAC 162-16-050 and 162-16-060 to nonminorities. |
| 162-16-080 | Purpose. |
| 162-16-090 | Job titles. |
| 162-16-100 | Discriminatory language. |
| 162-16-110 | Employment agencies. |
| 162-16-120 | Newspapers and other advertising media. |

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| 162-16-130 | Bona fide occupational qualification. |
| 162-16-140 | Affirmative action. |
| 162-16-150 | Discrimination because of spouse. |
| 162-16-160 | "Employer"—Jurisdictional count of number of persons employed. |
| 162-16-170 | Employee distinguished from independent contractor. |

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

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| 162-16-010 | Photographs of prospective employees. [Rule, filed 10/18/61.] Repealed by Order 8, filed 6/22/70. |
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WAC 162-16-020 Bona fide occupational qualification defined. (1) RCW 49.60.180 says:

"It is an unfair practice for any employer:
 (1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental or physical handicap, *unless based upon a bona fide occupational qualification: Provided,* That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.["] (Emphasis added.)

RCW 49.60.180(4) and 49.60.200, which declare that certain pre-employment inquiries and specifications are unfair practices of employers and employment agencies, respectively, contain the same exception for bona fide occupational qualifications.

(2) The term "bona fide occupational qualification" has not been defined by the legislature. Its meaning must be worked out through experience in administering the law and with reference to the general purposes of the law against discrimination and other expressions of public policy. The commission has so far recognized two areas where race, creed, color, national origin, age, sex, marital status, or handicap may be a bona fide occupational qualification:

(a) Where a person's race, creed, color, national origin, age, sex, marital status or handicap will be essential to, or will contribute to, the accomplishment of the purposes for which the person is hired.

(b) When race, creed, color, national origin, age, sex, marital status, or handicap must be considered in order to correct a condition of unequal employment opportunity.

(3) Part (2)(b) is explained in chapter 162-18 WAC, Corrective employment practices. Part (2)(a) may be illustrated by the following examples:

(a) The commission's policy on excellence in education emphasizes the goal of multiracial education for a multiracial world. The commission has said that where distance and the ethnic composition of a community prevent integration of a student body, multiracial education can be achieved through integration of the staff of the school. The race, creed, color or national origin of applicants for jobs at such a school is relevant to the accomplishment of a proper educational purpose, and is therefore a bona fide occupational qualification.

(b) An airline carrying passengers between the United States and Japan needs Japanese-speaking cabin attendants. The job qualification should be competency in spoken Japanese, not Japanese national origin, unless the airline is prepared to show that no one except persons of Japanese ancestry can properly serve the airline's Japanese clientele.

(c) An antipoverty program seeks to reach rural Spanish speaking families that do not come in contact with ordinary social agencies. In order to establish the desired rapport with such families, it may be necessary to employ workers who not only speak Spanish but who come from the same background. Being a Spanish-American may be a bona fide occupational qualification for such a job.

[Order 16, § 162-16-020, filed 5/22/74; Order 9, § 162-16-020, filed 9/23/71; Order 8, § 162-16-020, filed 6/22/70.]

WAC 162-16-030 Advice of commission. When requested to do so, the commission's staff will advise persons on how to meet particular employment needs consistently with the law against discrimination. In order to be safe, persons are advised to petition the commission for a declaratory ruling (see WAC 162-08-620) before proceeding to consider race, creed, color, national origin, age, sex, marital status, or handicap to be a bona fide occupational qualification in particular circumstances, unless the commission or another public agency with comparable jurisdiction has directed or authorized the action.

[Order 16, § 162-16-030, filed 5/22/74; Order 9, § 162-16-030, filed 9/23/71; Order 8, § 162-16-030, filed 6/22/70.]

WAC 162-16-040 Identification in use. Inquiries or specifications of race, creed, color, national origin, age, sex, marital status or handicap should always be accompanied by a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice.

[Order 16, § 162-16-040, filed 5/22/74; Order 9, § 162-16-040, filed 9/23/71; Order 8, § 162-16-040, filed 6/22/70.]

WAC 162-16-050 Discrimination in employment because of arrests. (1) It is an unfair practice for any employer, employment agency or labor union to refuse to hire or otherwise discriminate against a person in employment because he or she has been arrested.

(2) An arrest, without more, is no indication of guilt, and historically minorities have suffered from unequal law enforcement. See *Carter v. Gallagher*, 451 F.2d 315 (8th Cir. 1971); *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C. Dist. Cal. 1970). The U.S. Department of Labor has also recognized the potential for discrimination in consideration of arrest records. See § 60-2.24(d)(3) of Revised Order No. 4, which establishes standards and guidelines for the affirmative action programs required of government contractors.

(3) Preemployment inquiries as to arrests are an unfair practice. See WAC 162-12-140.

(4) Law enforcement agencies are exempt from this regulation at this time; however, nothing in this regulation precludes a law enforcement agency in its discretion from adopting the policy set forth herein.

[Order 19, § 162-16-050, filed 1/20/75.]

WAC 162-16-060 Discrimination in employment because of convictions. (1) It is an unfair practice for an employer, employment agency or labor union to refuse to hire or otherwise discriminate against a person simply because he or she has been convicted of a crime, but the conviction may be considered to the extent that it reveals the current presence of absence of specific qualifications for a job and

(a) All applicants are evaluated alike for the qualifications under consideration; and

(b) The date of the conviction or prison release, whichever is more recent, is less than 7 years old.

(2) For rules on preemployment inquiries as to convictions, see WAC 162-12-140.

(3) To the extent that an employment practice automatically excludes persons with convictions, it has the potential for discrimination because of race and ethnic origin. See *Carter v. Gallagher*, 451 F.2d 315 (8th Cir. 1971). This is because minority groups in our society have experienced unequal law enforcement. On the other hand, an employer should have the right to exclude persons who have been convicted of *certain* offenses from consideration for *certain* kinds of jobs, at least if the conviction is relatively recent and the exclusion is done on a carefully considered basis. Each person who will evaluate information concerning criminal records should be given careful instructions as to confidentiality and proper use of the information.

(4) In determining the extent to which a conviction or convictions reveals a person's current job qualifications, the employer, employment agency or labor union should consider such factors as the recentness or remoteness of the conviction, and available data on the extent to which persons convicted of that crime are likely to repeat it.

(5) This regulation takes into account the public policy of the state to rehabilitate felons through open job opportunity, expressed in chapter 9.96A RCW, as well as the purposes and policies of the law against discrimination.

(6) Public employers should follow the requirements of RCW 9.66A.020 [9.96A.020] to the extent that it is inconsistent with this regulation. RCW 9.66A.020 [9.96A.020] provides:

"Notwithstanding any other provisions of law to the contrary, a person shall not be disqualified from employment by the state of Washington or any of its agencies or political subdivisions, nor shall a person be disqualified to practice, pursue or engage in any occupation, trade, vocation, or business for which a license, permit, certificate or

registration is required to be issued by the state of Washington or any of its agencies or political subdivisions solely because of a prior conviction of a felony: *Provided*, This section shall not preclude the fact of any prior conviction of a crime from being considered. However, a person may be denied employment by the state of Washington or any of its agencies or political subdivisions, or a person may be denied a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, or business by reason of the prior conviction of a felony if the felony for which he was convicted directly relates to the position of employment sought or to the specific occupation, trade, vocation, or business for which the license, permit, certificate or registration is sought, and the time elapsed since the conviction is less than ten years."

(7) Law enforcement agencies are exempt from this regulation at this time; however, nothing in this regulation or chapter 9.66A [9.96A] RCW precludes a law enforcement agency in its discretion from adopting the policy set forth herein.

[Order 19, § 162-16-060, filed 1/20/75.]

WAC 162-16-070 Applicability of WAC 162-16-050 and 162-16-060 to nonminorities. The protection from discrimination because of arrest or conviction records under the law and this regulation is not confined to minority group members, but applies to anyone, in order to afford equal treatment without respect to race.

[Order 19, § 162-16-070, filed 1/20/75.]

WAC 162-16-080 Purpose. This regulation is issued to inform employers, employment agencies, and newspapers of specific interpretations given by the Washington state human rights commission to the following parts of the law against discrimination:

(1) RCW 49.60.180 and 49.60.200 make it an unfair practice for employers of eight or more employees and employment agencies "to print, or circulate, or cause to be printed or circulated any statement, advertisement or publication in connection with prospective employment which expresses any limitation, specification or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language."

(2) RCW 49.60.220. "It is an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice, or to attempt to obstruct or prevent any other person from complying with the provisions of this chapter or order issued thereunder."

[Order 20, § 162-16-080, filed 1/20/75.]

WAC 162-16-090 Job titles. (1) It is an unfair practice for an employer of 8 or more or an employment agency to use a sex specific job title in any help wanted advertisement, job or position description, job announcement, or any other notice, statement, or publication, unless the employer has shown the applicability of a bona fide occupational qualification (BFOQ) exception as provided for in WAC 162-16-130 below.

The term "sex specific job titles" shall include any job title which contains a gender noun or suffix, such as waitress, foreman, salesman, maid, counter girl, as exemplified in the chart below in this subsection.

If the use of a neutral job title is not practicable, two alternatives are permissible: (1) The sex specific job title may be hyphenated to its counterpart title (e.g., waiter/waitress); (2) the sex specific title may be used if accompanied by the designation "man or woman," "male or female," or "M-F" (e.g., foreman, man or woman; tailor, male or female; lineman, M-F).

The following chart may be revised from time to time by the commission staff. It should be noted that the sex neutral terms in the right column are suggested only. Employers who wish further assistance are invited to call the commission staff.

| EXAMPLES OF SEX SPECIFIC JOB TITLES: | SUGGESTED SUBSTITUTES: |
|--------------------------------------|--|
| Auto partsman | Auto parts worker, parts specialist |
| Barmaid | Bar helper, cocktail server, table server |
| Bell boy (bellman) | Bell hop, luggage handler, hotel assistant |
| Body man | Body work specialist, auto repairer |
| Busboy, tray girl | Busser, dish bussing, cafeteria worker |
| Camera man | Camera technician, camera operator, camera sales |
| Cleaning woman, cleaning lady .. | Cleaning assistant, room cleaner |
| Corpsman | Paramedic, medical assistant |
| Counter girl, counter boy | Counter clerk, counter attendant |
| Credit girl | Credit clerk, credit analyst |
| Doorman | Door attendant |
| Draftsman | Drafter, drafting specialist (technician) |
| Farm man | Farm worker, farm hand |
| Foreman | Supervisor |
| Girl Friday | General office worker |
| Handyman | Miscellaneous repairer |
| Janitor, janitress | Custodian, maintenance assistant worker |
| Journeyman | Journey level |
| Layman | Layout specialist |
| Leadman | Crew leader, shift leader, leader |
| Maid | Domestic helper, housekeeper, room cleaner |
| Maintenance man | Maintenance worker |
| Partsman | Parts worker |

EXAMPLES OF SEX SPECIFIC JOB TITLES:

SUGGESTED SUBSTITUTES:

| | |
|--|---|
| Phone girls | Phone worker, telephone sales agent |
| Repairman | Repairer, repairworker |
| -ess or -ette titles (e.g., waitress, seamstress, janitress, hostess, usherette, etc.) | (1) If practicable, change the title completely (e.g., change "waiter/waitress" to "meal attendant, table server, etc."). "seamstress" to "sewing specialist," "usher/usherette" to "guide." (2) Use the counterpart title with a male-female designation to counteract any connotations of gender (e.g., "tailor, male or female"; "janitor (or custodian), male or female"). (3) Use the sex specific title and its counterpart hyphenated (e.g., "waiter/waitress"). |
| Salad girl | Salad maker |
| Salesman, saleslady, saleswomen .. | Salesperson, sales clerk, sales representative |
| Sheet metal man | Sheet metal worker |
| Warehouseman | Fork lift operator, warehouse worker |

(2) The commission encourages the use of "male or female," "man or woman" or "M-F" in all help wanted advertisements. This is because most job titles, through long practice and association, have acquired the connotation of one gender or the other. Titles such as secretary, nurse, housekeeper, teacher, bookkeeper, and sales clerk have become associated with "women's work," while titles such as manager, doctor, mechanic, superintendent, accountant, and custodian have become associated with "men's work." An equal opportunity employer should attempt to counteract connotations of sex preference.

[Order 20, § 162-16-090, filed 1/20/75.]

WAC 162-16-100 Discriminatory language. Any word, term, phrase, or expression which tends to influence, persuade or dissuade, encourage or discourage, attract or repel, any person or persons because of race, color, creed, sex, marital status, age, national origin, or the presence of any physical, mental or sensory handicap, shall be considered discriminatory advertising in violation of the law, unless the language in questions is justified by a BFOQ, as provided for in WAC 162-16-070, or a purpose of affirmative action, as provided for in WAC 162-16-080 below.

In the absence of a BFOQ or purpose of affirmative action, the commission will consider the following language (left column) discriminatory and therefore unacceptable in job advertisements or notices. (See acceptable substitutes at right.) The following chart may be revised from time to time by the commission staff. Employers who wish further assistance in developing nondiscriminatory language are invited to call the commission staff.

DISCRIMINATORY: SUGGESTED SUBSTITUTES:

| | |
|--|--|
| Man, woman, girl, gal, boy, lady, etc. | Person, applicant, hiree, one, trainee, or a sex-neutral job title |
| Cute, glamorous, pretty, cleancut, handsome, attractive | Neat, well-groomed, personable, good public relations appearance |
| He-man, husky, brawny | Specify the lifting required |
| Married, single | No substitutes |
| Gal Friday | Assistant, secretary, clerk, office manager |
| Recent graduate, new graduate, college student (implies preference for youth) | Degree required |
| Mother, housewife | Part-time, short hours |
| Vivacious | Enthusiastic, alert, attentive, intelligent |
| Young | Entry level, beginner, trainee, minimum wage |
| Christian, Jewish, etc. | No substitutes |
| Interracial, segregated, Black, Negro, White, colored, Oriental, Asian, minority, restricted | No substitutes |
| | Other nondiscriminatory terms: minimum wages; stable, responsible, able to travel, long hours, overtime, willing to relocate |

[Order 20, § 162-16-100, filed 1/20/75.]

WAC 162-16-110 Employment agencies. It is an unfair practice for any employment agency to:

(1) Handwrite, print, or circulate any interoffice or interagency communication, job order, advertisement, brochure, or notice which expresses overtly or subtly, directly or indirectly a preference, specification or limitation on the basis of race, color, creed, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicaps, unless the expression is based on a BFOQ as provided for in WAC 162-16-030, or a purpose of affirmative action, as provided for in WAC 162-16-040 below.

(2) Maintain, formally or informally, agency division titles which are not clearly neutral in terms of sex. The commission will consider the following division titles discriminatory: (See nondiscriminatory titles at right).

DISCRIMINATORY: NONDISCRIMINATORY:

| | |
|--|---|
| Female division, career girl division; male division | Office services division; secretary-clerical division; professional division; technical division; sales division; administrative division |
|--|---|

The commission recommends that employment agency names be neutral in terms of sex. Names or titles which include a gender noun, such as "career girl services," tend to deter and therefore deny employment opportunities unnecessarily to one sex or the other. Recognizing that it takes time to change a business title, the commission will reconsider the matter no sooner than July

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1975, to determine if a formal regulation on employment agency names is still needed.

Nothing in the law or this regulation shall prohibit any employment agency from maintaining an affirmative action file or giving special assistance to help employers recruit minorities, female, or handicapped applicants. (See WAC 162-16-080 below.)

[Order 20, § 162-16-110, filed 1/20/75.]

WAC 162-16-120 Newspapers and other advertising media. (1) It is an unfair practice for a newspaper or other advertising medium to publish or circulate within the state an employment advertisement under a column heading or designation which segregates or expresses a preference on the basis of race, color, creed, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap, unless the heading designation or segregation relates solely to employment for which a BFOQ applies as provided for in WAC 162-16-130 below.

(2) It is not an unfair practice for any newspaper or other advertising medium to print, publish, or circulate employment advertisements expressing the wording of the advertisement, or subtly, directly or indirectly a preference, specification or limitation on the basis of race, color, creed, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap, provided the newspaper or other advertising medium furnishes, on request of a duly authorized representative of the commission, the name and address of the person who submitted the advertisement for publication.

(3) The commission encourages advertising media which circulate employment advertisements to maintain lists of discriminatory job titles and terms and suggested substitutes, as compiled by the commission, to instruct their ad-takers to advise employers and employment agencies of these terms and to have copies of this regulation available for distribution to advertisers on request.

[Order 20, § 162-16-120, filed 1/20/75.]

WAC 162-16-130 Bona fide occupational qualification. The commission believes that the BFOQ should be applied narrowly to jobs for which a particular quality of sex, race, age, etc. . . ., is essential to the accomplishment of the purposes of the job.

Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) or maintaining conventional standards of sexual privacy (e.g., lockerroom attendant, intimate apparel fitter), the commission will consider sex to be a BFOQ. Any other type of BFOQ should be very carefully considered. To be safe, the employer should request a BFOQ ruling from the Washington state human rights commission and cite the ruling in the employment advertisement.

Anytime that an employment advertisement or notice expresses a preference, limitation, or discrimination based on sex, marital status, race, color, creed, age, national origin, or the presence of any physical, sensory, or mental handicaps, the burden shall be on the employer to prove that the expression is justified by a BFOQ. In

the absence of proof, the advertisement will be considered an unfair practice under the law. (For further guidance on the meaning of BFOQ, see WAC 162-16-020.)

[Order 20, § 162-16-130, filed 1/20/75.]

WAC 162-16-140 Affirmative action. Employers should encourage minorities, women and the handicapped, to apply for jobs where they have been traditionally excluded or where they are currently underrepresented in the employer's business. Such a recruitment effort is called "affirmative action."

Advertisements used to accomplish affirmative action may contain nonexclusionary phrases, such as: "Minorities, women, and/or handicapped persons are encouraged to apply."

IT IS NOT PERMISSIBLE, however, to express or exercise a hiring preference based on sex, race, handicap, etc. . . ., unless the employer has a court order to do so or an authorization from the Washington state human rights commission or another governmental agency of competent authority and jurisdiction.

Anytime an advertisement or notice encourages minorities, women, or handicapped persons to apply, the burden shall be on the employer to prove that the purpose is to accomplish affirmative action. Employers and employment agencies are encouraged to seek advice from the commission staff before placing affirmative action advertisements.

[Order 20, § 162-16-140, filed 1/20/75.]

WAC 162-16-150 Discrimination because of spouse. (1) **Authority.** This section implements RCW 49.60.180, 49.60.190 and 49.60.200, which declare that discrimination because of marital status or sex is an unfair practice of employers, labor unions, and employment agencies, respectively.

(2) **General rule and exception.** In general, discrimination against an employee or applicant for employment because of (a) what a person's marital status is; (b) who his or her spouse is; or (c) what the spouse does, is an unfair practice because the action is based on the person's marital status. It may also be an unfair practice because of sex, where it burdens women much more than men, or men much more than women. However, there are certain circumstances where business necessity may justify action on the basis of what the spouse does, and where this is so the action will be considered to come within the bona fide occupational qualification exception to the general rule of nondiscrimination. "Business necessity" for purposes of this section includes those circumstances where an employer's actions are based upon a compelling and essential need to avoid business-related conflicts of interest, or to avoid the reality or appearance of improper influence or favor.

(3) **Examples.**

(a) The following are examples of actions which are unfair practices within the general rule against discrimination because of marital status or sex:

(i) Refusal to hire a person because her or his spouse has a job and is "making good money."

(ii) Refusal to hire a person because his or her spouse is already employed by the same employer, except for particular positions where business necessity requires exclusion of relatives, consistently with this section.

(iii) Discharge of a person because he or she has married another employee of the same employer, unless the spouses occupy positions where business necessity requires the exclusion of relatives, consistent with this regulation, and neither spouse can be transferred to a position where the business necessity reason doesn't apply.

(b) The following are examples of business necessity situations where it is not an unfair practice for an employer to impose rules limiting the employment of spouses:

(i) Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other;

(ii) Where one spouse would be responsible for auditing the work of the other;

(iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own;

(iv) Where, in order to avoid the reality or appearance of improper influence or favor, or to protect its confidentiality, the employer must limit the employment of close relatives of *policy level* officers of customers, competitors, regulatory agencies, or others with whom the employer deals.

(4) **Least discriminatory practice required.** Where business necessity requires the limitation of employment opportunity of spouses, the means chosen to meet the business necessity shall be those which have the least adverse impact on spouses or members of either sex. For example:

(i) The exclusion should be limited to the job, work crew, shop, or unit where the reason for the exclusion exists, and should not bar the person from the whole work force, unless the reason applies to the whole work force;

(ii) When it is necessary to exclude a person because of what his or her spouse does, then the employer, employment agency, or labor organization should not determine which spouse shall keep the job.

(5) **Limitations on duty.** Except in the special circumstances covered in subsection (4), an employer, employment agency, or labor union has no duty under the law against discrimination to give special treatment to spouses. For example, the employer of both spouses has no duty to schedule their working hours or vacations simultaneously, or to take the spouses preferences on these points into account beyond what is done for employees whose spouses work elsewhere. And, of course, an employer may refuse to hire an applicant spouse for any reason other than marital status, sex, or other unfair practices under the law against discrimination. However, mixed fair and unfair motives are not a defense to a charge of discrimination, so the identity or status of a spouse must be given *no weight at all* in the employment decision unless the business necessity exception applies.

(6) **Burden of justification.** Since the bona fide occupational qualification is an exception to the general rule of nondiscrimination, the burden is on the employer, employment agency, or labor organization to show that the discrimination is justified. (See *Weeks v. Southern Bell Telephone and Telegraph Company*, 408 F.2d 228 (5th Cir. 1969)). Employers, employment agencies, and labor organizations should therefore inform themselves of the circumstances before concluding that the exclusion of a spouse is justified, and be prepared to furnish that justification to the commission in case a complaint is filed or other investigation is made.

(7) **Relative other than spouses.** Spouses are within a protected class under the law against discrimination (marital status); other relatives are not. The commission therefore has no role in regulating an employer's treatment of relatives other than spouses, unless discrimination because of sex, race, etc. should be involved. However, a business necessity justification for treating spouses adversely would almost always apply with equal force to other close relatives. Therefore, any employment actions that are taken against spouses but not against other close relatives will be considered to be prima facie discriminatory for lack of business necessity justification.

(8) **Advice of commission.** The commission's staff will give informal advice on compliance with this regulation to persons who request it. Persons who want formal advice may petition the commission for a declaratory ruling under RCW 34.04.080 and WAC 162-08-620.

[Order 21, § 162-16-150, filed 4/18/75.]

WAC 162-16-160 "Employer"—Jurisdictional count of number of persons employed. (1) **Purpose and scope of section.** This section implements RCW 49.60-.040, which defines "employer" for purposes of the law against discrimination in part as "any person . . . who employs eight or more persons." This section establishes standards for determining who is counted as employed when deciding whether a person is an employer under the quoted language. The standards in this section do not define who is entitled to the protection of the law against discrimination (for example, a part-time employee who does not work enough hours to be counted under subsection (5) of this section is entitled to the protection of the law against discrimination).

(2) **Purposes of exemption.** The principal purposes of exempting persons who employ less than eight from the enforcement authority of the commission are:

(a) To relieve small businesses of a regulatory burden; and

(b) In the interest of cost effectiveness, to confine public agency enforcement of the law to employers whose practices affect a substantial number of persons.

(3) **General approach.** Our objectives in choosing the standards in this section and in making future decisions on questions not addressed in this section are:

(a) To eliminate and prevent discrimination — the overall purpose of the law against discrimination.

(b) To give effect to the purposes of the exemption of employers of less than eight from public enforcement of

the law against discrimination, as identified in subsection (2) of this section.

(c) To be consistent with interpretations of federal antidiscrimination law and the antidiscrimination laws of other states, where these are comparable to Washington law, and where we do not feel that a different rule would better serve the state of Washington.

(d) To avoid the uncritical adoption of definitions from areas of law other than antidiscrimination law. It is appropriate to define employment differently in different areas of the law in order to carry out the separate purpose of each area of law.

(e) Administrative convenience. The public and our staff need standards that are certain and that are easy to understand and apply. Therefore we must sometimes simply draw a line, although reasonable persons could differ as to where the line should be drawn.

(4) **Time of calculation.**

(a) A person will be considered to have employed eight if the person either:

(i) Employed eight or more persons for any part of the day on which the unfair practice is alleged to have occurred, or did occur; or

(ii) Employed an average of eight or more persons over a representative period of time including the time when the unfair practice is alleged to have occurred.

(b) The representative period of time for (a)(ii) of this subsection will ordinarily be the month during which the unfair practice is alleged to have occurred plus the preceding two months, but where this period will not accurately reflect the overall employment level, as in a seasonal industry, we will use the month during which the alleged unfair practice is alleged to have occurred plus the preceding eleven months.

(c) An average of eight persons employed will be found for (a)(ii) of this subsection if:

(i) The total hours worked by all employees during the examined period equals or exceeds sixty-four times the number of working days (the equivalent of eight persons working eight-hour days); or

(ii) The total of all persons employed full time or part time during the period exceeds seven on more days than it is seven or less.

(5) **Part-time employees.**

(a) A person working part time will be counted as employed on the day on which the unfair practice is alleged to have occurred, or did occur, if the person worked any part of that day.

(b) A person working part time will be counted as employed for purposes of averaging under subsection (c)(ii) of this section if the person worked one-fifth of full time.

(c) Persons subject to call to work (such as volunteer fire fighters) will be considered to be employed at all times when they are subject to call.

(6) **Area of calculation.** A person who employs eight or more persons is an "employer" for purposes of the law against discrimination even though less than eight of the employees are located in the state of Washington.

(7) **Multiple places of employment.** The count will include all persons employed by the same legal entity,

whether or not the persons work in the same place of business or line of business.

(8) **Connected corporations.** Corporations and other artificial persons that are in common ownership or are in a parent-subsidary relationship will be treated as separate employers unless the entities are managed in common in the area of employment policy and personnel management. In determining whether there is management in common we will consider whether the same individual or individuals do the managing, whether employees are transferred from one entity to another, whether hiring is done centrally for all corporations, and similar evidence of common or separate management.

(9) **Persons on layoff.** Persons on layoff will not be counted.

(10) **Persons on leave.** Persons on paid leave will be counted. Persons on unpaid leave will not be counted.

(11) **Employee or independent contractor.** Independent contractors will not be counted. In determining whether a person is employed or is an independent contractor for the jurisdictional count we will use the same standards that we use for the purpose of determining whether a person comes within the protection of the law against discrimination. These standards are set out in WAC 162-16-170.

(12) **Pay.** Anyone who is paid for work and who otherwise meets the standards in this section will be counted. Pay includes compensation for work by the hour, by commission, by piecework, or by any other measure. For the treatment of unpaid persons, see volunteers, subsection (13) of this section.

(13) **Volunteers.** A volunteer will be counted if the volunteer is generally treated in the manner that employers treat employees. That is, if the volunteer is selected by management (particularly if selected in competition with other persons), works hours assigned by management, is subject to discipline like an employee, or receives employment benefits such as industrial insurance, then the person will be counted as an employee. The typical volunteer fire fighter would be counted. A person who comes into the food bank when he or she pleases, is put to work if there is anything to do, who leaves when he or she pleases, who has no expectation of paid employment, and who receives no employment benefits, would not be counted.

(14) **Family members.** Because of the definition of "employ" in RCW 49.60.040, we will not count "any individual employed by his or her parents, spouse, or child." Other family members will be counted.

(15) **Domestic help.** Because of the definition of "employ" in RCW 49.60.040, we will not count a person in the domestic service of the employing person.

(16) **Directors.** Directors of corporations, and similar officers of other private or public artificial legal entities, will not be counted simply because they serve in that capacity.

(17) **Officers.** Officers of corporations, and officers of other private or public artificial legal entities, will be counted unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers.

(18) **Partners.** Partners will not be counted as employed by the partnership or by each other.

(19) **Members of a professional service corporation.** All persons who render professional services for a professional service corporation will be counted as employees of the corporation.

(20) **Interns.** Interns and persons on work-study programs will be counted if they are paid by the person whose employees are being counted; they will not be counted if they are not paid or are paid by another entity.

[Statutory Authority: RCW 49.60.120(3). 82-19-072 (Order 42), § 162-16-160, filed 9/20/82.]

WAC 162-16-170 Employee distinguished from independent contractor. (1) Purpose of section. RCW 49.60.180 defines unfair practices in employment. A person who works or seeks work as an independent contractor, rather than as an employee, is not entitled to the protection of RCW 49.60.180. This section outlines the standards that we will use to determine whether a person is an employee as distinguished from an independent contractor for the purpose of entitlement to the protection of RCW 49.60.180.

(2) Rights of independent contractor. While an independent contractor does not have the protection of RCW 49.60.180, the contractor is protected by RCW 49.60.030(1) from discrimination because of race, creed, color, national origin, sex, handicap, or foreign boycotts. The general civil right defined in RCW 49.60.030(1) is enforceable by private lawsuit in court under RCW 49.60.030(2) but not by actions of the Washington state human rights commission.

(3) General approach. We will determine whether a person is an employee or an independent contractor on the basis of general common law principles, taking into account the economic realities of the situation and the purposes of the law against discrimination.

(4) Working presumptions. When any two of the following indications of employment are present, the worker will be presumed to be an employee unless the person who claims that the worker is not an employee presents evidence requiring the consideration of other factors:

(a) The purchaser of work in fact controls the manner and means of performance of the work.

(b) The worker is paid on the basis of time worked (hourly, monthly, etc.).

(c) The worker is treated as an employee for tax purposes.

(5) Full analysis. When a full analysis is required, we will consider all the relevant facts, particularly those bearing on the following factors. No one factor is determinative, but the most important is the extent to which the purchaser of work controls the manner and means of performance of the work.

(a) Control. An employment relationship probably exists where the purchaser of work has the right to control and direct the work of the worker, not only as to the result to be achieved, but also as to the details by which the result is achieved.

(b) The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision. Some persons, such as lawyers or doctors, may be employees even though they are not closely supervised. The test for such specialists is not whether the lawyer or doctor is closely supervised, but whether he or she is treated the way that employed lawyers or doctors are commonly treated. Lawyers and doctors are typically independent contractors, however, with respect to their clients or patients.

(c) The skill required in the particular occupation. Skilled workers are typically less closely supervised than unskilled workers, but they are employees if indicia of employment other than close supervision are present.

(d) Whether the purchaser of the work or the worker furnishes the equipment used and the place of work. Generally, the purchaser of work furnishes tools and equipment for employees while independent contractors furnish their own. Some employees furnish some of their own tools, however.

(e) The length of time during which the person has worked or the length of time that the job will last. Independent contractors typically are hired for a job of relatively short duration, but there are instances of independent contracts for an indefinite period – for example, contracts for janitorial service.

(f) The method of payment, whether by time or by the job. Independent contractors are usually paid by the job but are sometimes paid by time. Employees are usually paid by time but are sometime paid by the job.

(g) Whether the work relationship is terminable by one party or both parties, with or without notice and explanation. An employee is usually free to quit and is usually subject to discharge or layoff without breach of the employment contract. An independent contractor usually has more fixed obligations.

(h) Whether annual leave is afforded. Leave with pay is almost exclusively accorded to employees.

(i) Whether the work is an integral part of the business of the purchaser of it. Usually, the regular work of a business is done by employees rather than independent contractors.

(j) Whether the worker accumulates retirement benefits. Retirement benefits are almost exclusively accorded to employees.

(k) Whether with respect to the worker the purchaser of work pays taxes levied on employers, such as the social security tax, unemployment compensation tax, and worker's compensation tax, or withholds federal income tax. The tax laws do not have the same purposes as the law against discrimination, so employee status for tax purposes is helpful but not controlling.

(l) Whether the worker treats income from the work as salary or as business income. See part 5(k) of this section.

(m) Whether with respect to the worker the purchaser of work keeps and transmits records and reports required of employers, such as those required under the worker's compensation act. Worker's compensation coverage, like tax coverage, is helpful but not conclusive.

(n) The intention of the parties. The fact that a contract says that the worker is an independent contractor will be considered in this respect, but it is not conclusive for the purpose of coverage of RCW 49.60.180.

(o) Burden of persuasion. The burden of persuasion that a person claiming the protection of RCW 49.60.180 is or would be an independent contractor is on the person making the claim.

[Statutory Authority: RCW 49.60.120(3). 82-19-072 (Order 42), § 162-16-170, filed 9/20/82.]

Chapter 162-18 WAC

CORRECTIVE EMPLOYMENT PROGRAMS

WAC

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WAC 162-18-010 Corrective employment program defined. As use in this chapter, the term "corrective employment program" means a program designed to increase the number of employees of a particular protected class in an industry, occupation or place of work in order to correct a condition of underrepresentation of such employees caused by present or past practices, customs or usages of the employer or others that have limited employment opportunities for members of the affected group.

[Order 16, § 162-18-010, filed 5/22/74; Order 9, § 162-18-010, filed 9/23/71; Order 8, § 162-18-010, filed 6/22/70.]

WAC 162-18-020 Purpose and policy. (1) It is the purpose of the law against discrimination to eliminate as well as prevent discrimination in employment. RCW 49.60.010. Where there has been a pattern of exclusion of a class of persons from a job or workforce, an employer's decision to adopt a posture of neutrality for the future may not eliminate the pattern; it may in fact assure that the pattern will continue. In such a situation, corrective steps to employ members of the excluded class equalize employment opportunity by offsetting advantages already enjoyed by others.

(2) The purposes of this regulation are to establish guidelines for corrective employment programs and to declare that:

(a) It is the policy of the Washington state human rights commission to encourage corrective employment programs where they are appropriate.

(b) The Washington state human rights commission interprets the law against discrimination to mean that corrective employment programs are not prohibited by the law and in some circumstances are required by it.

(c) The commission will closely monitor the adoption and implementation of corrective employment programs to see that they operate consistently with the purposes of the law against discrimination.

[Order 9, § 162-18-020, filed 9/23/71; Order 8, § 162-18-020, filed 6/22/70.]

WAC 162-18-030 Corrective employment programs are lawful. It is not an unfair practice for purposes of RCW 49.60.180 (employers), RCW 49.60.190 (labor unions) or RCW 49.60.200 (employment agencies) for a person to adopt and use corrective employment programs which comply with the requirements of this chapter or which have been individually approved by the commission.

[Order 9, § 162-18-030, filed 9/23/71; Order 8, § 162-18-030, filed 6/22/70.]

WAC 162-18-040 Permissible components of program. (1) A corrective employment program may include provisions for:

(a) Ascertaining the race, creed, color, national origin, age, sex, marital status, or handicap of applicants.

(b) Use of knowledge of the applicant's race, creed, color, national origin, age, sex, marital status, or handicap in the selection process, or for referral or dispatching.

(c) Use of procedural devices such as special files of applications submitted by members of the affected protected class to assure contact with members of the affected class when employment opportunities become available.

(d) Use of specially qualified persons or organizations to reach persons of the affected protected class.

(e) Special rules for retention of persons of the affected protected class in case of layoff.

(f) Use of other procedures that are appropriate to correct the particular conditions at which the program is directed.

(2) The purpose of a corrective employment program is to include persons of the underrepresented protected class into the employment process; not to exclude others from it. Ordinarily, therefore, it will not be acceptable for a corrective employment program to provide for hiring only applicants from the underrepresented protected class. Persons reached by the corrective employment program should be considered along with those who have applied through normal employment channels, and the employer's normal business judgment should determine who is hired. It is permissible for the employer to give weight to the fact that an applicant is from a class of persons which is underrepresented because practices, customs or usages have limited opportunities for members of the class in the industry, occupation, or

place of work. It is permissible to ask for applicants of only the underrepresented protected class of persons from a particular source, or at a particular time, if other applicants are not excluded from the total hiring process but have access from another source, or are considered at another time. It shall not be permissible to discharge any employee to implement a corrective employment program.

[Order 16, § 162-18-040, filed 5/22/74; Order 9, § 162-18-040, filed 9/23/71; Order 8, § 162-18-040, filed 6/22/70.]

WAC 162-18-050 When programs may be used. (1) An employer or labor union may use a corrective employment program:

(a) When ordered to do so by a court or administrative body of competent jurisdiction.

(b) When it consents to carry out the program in settlement of a complaint pending before the Washington state human rights commission or other public agency with comparable powers.

(c) When it voluntarily has determined for itself that employees of one or more of the protected classes are underrepresented in its workforce or in an occupation or place of work because present or past practices, customs or usages have limited opportunities for them, and it has voluntarily adopted a corrective employment program and, when necessary, has obtained the approval of this commission pursuant to WAC 162-18-080.

[Order 16, § 162-18-050, filed 5/22/74; Order 9, § 162-18-050, filed 9/23/71; Order 8, § 162-18-050, filed 6/22/70.]

WAC 162-18-060 Termination of programs. The special treatment accorded to particular groups by a corrective employment program is justified only so long as it is necessary to achieve equality of opportunity for all classes of employees. Every corrective employment program should provide for its own termination when the effects of inequality of opportunity have been eliminated.

[Order 9, § 162-18-060, filed 9/23/71; Order 8, § 162-18-060, filed 6/22/70.]

WAC 162-18-070 Voluntary programs recommended. The Washington state human rights commission urges every employer and every labor union operating a hiring hall to determine whether its workforce is imbalanced in view of the composition of the community, and whether the imbalance has been caused by practices, customs or usages of the employer, the union or others that have limited employment opportunities for members of any protected class. When these two circumstances are found to exist, the employer or union should institute a corrective employment program. For example, where the employer does no recruiting but relies on walk-in applicants who have learned of vacancies by word-of-mouth from present employees who are all white, the ordinary result is a perpetuation of the all-white composition of his work-force. In such a situation, the employer should adopt a corrective employment program. The commission's staff will help draw up the program if requested to do so.

[Order 16, § 162-18-070, filed 5/22/74; Order 9, § 162-18-070, filed 9/23/71; Order 8, § 162-18-070, filed 6/22/70.]

WAC 162-18-080 Commission approval of voluntary programs. A voluntary corrective employment program may depart from the general standards of the preemployment inquiry guide, chapter 162-12 WAC, only if it has been approved in advance by the executive secretary of the commission, or his designate. Programs that do not depart from the standards of the preemployment inquiry guide need not be so approved, but may be submitted for approval if the employer or labor union chooses to do so. Approval will be granted subject to revocation in the event that the plan in its practical operation does not conform to the law against discrimination and this chapter. Application for approval may be made by letter. The application should contain a fully detailed description of the proposed program, including the provisions for termination in compliance with WAC 162-18-060.

[Order 9, § 162-18-080, filed 9/23/71; Order 8, § 162-18-080, filed 6/22/70.]

WAC 162-18-090 Job orders specifying race, creed, color, national origin, sex, marital status, handicap or age. (1) Where an employer specifies that some or all applicants for jobs be of a particular race, creed, color, national origin, sex, marital status, handicap, or age pursuant to a corrective employment program that has been ordered, agreed to in settlement of a case, or voluntarily undertaken with approval of the commission, the specification shall be a bona fide occupational qualification for purposes of RCW 49.60.180(4), 49.60.200 and WAC 162-12-140, and shall not be an unfair practice. Any specification shall be accompanied by a notation that membership in the particular protected class or classes is a bona fide occupational qualification for the job and shall refer to the case providing for the corrective employment program or the commission's approval of the program.

(2) When an employer is authorized or directed to use a corrective employment program, an employment agency acting for it, including a labor union which refers workmen to the employer, may do all things the employer is authorized or directed to do, and the actions of the employment agency or union shall not be an unfair practice for purposes of RCW 49.60.200 or 49.60.190 or WAC 162-12-140. The employment agency or labor union shall identify any such specification as a bona fide occupational qualification and shall refer to its source, the same as the employer is required to do.

[Order 16, § 162-18-090, filed 5/22/74; Order 9, 162-18-090, filed 9/23/71; Order 8, 162-18-090, filed 6/22/70.]

WAC 162-18-100 Construction--Relation to pre-employment inquiry guide. In adopting this chapter it is not the intention of the commission to supersede the preemployment inquiry guide, chapter 162-12 WAC. The preemployment inquiry guide shall continue to apply to all employers and employment agencies including those with corrective employment programs except to the extent the corrective employment program departs

from it. When a corrective employment program which has been ordered, agreed to in settlement of a case, or voluntarily undertaken with approval of the commission, makes provisions for ascertaining and using knowledge of race, creed, color, sex, marital status, handicap, age, or national origin, the specific provisions establish a bona fide occupational qualification for purposes of WAC 162-12-140.

[Order 16, § 162-18-100, filed 5/22/74; Order 9, § 162-18-100, filed 9/23/71; Order 8, § 162-18-100, filed 6/22/70.]

Chapter 162-20 WAC AGE DISCRIMINATION IN PUBLIC EMPLOYMENT

WAC

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| 162-20-010 | Purpose. |
| 162-20-020 | Statutes interpreted. |
| 162-20-030 | Jurisdiction of commission. |
| 162-20-040 | Complaints concerning public employment. |
| 162-20-050 | Duties of staff. |
| 162-20-060 | Commission action. |
| 162-20-070 | Primary jurisdiction. |
| 162-20-080 | Pending complaints covered. |

WAC 162-20-010 Purpose. These rules are adopted for the purpose of clarifying the jurisdiction of the Washington state human rights commission in enforcement of the age discrimination provisions of RCW 49.60.180 and 49.44.090, with respect to candidates for public employment.

[Order 9, § 162-20-010, filed 9/23/71; Resolution, § 1, filed 10/18/63.]

WAC 162-20-020 Statutes interpreted. Section 1, chapter 100, Laws of 1961, amended RCW 49.60.180 to add discrimination because of age, as an unfair practice of employers. RCW 49.60.180 is part of the law against discrimination and originally covered only discrimination because of race, creed, color or national origin.

RCW 49.60.010, which gives the human rights commission general jurisdiction and powers ". . . with respect to elimination and prevention of discrimination in employment . . . because of race, creed, color, or national origin . . ." was not amended.

RCW 49.60.120, which sets out the powers and duties of the commission, was not amended. It still reads that the commission has the power and duty to ". . . receive, investigate and pass upon complaints alleging unfair practices as defined in this chapter because of race, creed, color, or national origin."

RCW 49.44.090, a new section originating in chapter 100, Laws of 1961, reads in part:

" . . .
"Nothing contained in this section or in RCW 49.60.180 as to age shall be construed . . .; nor shall anything in this section or in RCW 49.60.180 be deemed to preclude . . .; nor shall this section be construed . . . as superseding any law fixing or authorizing the establishment of reasonable minimum or maximum age limits with respect to candidates for certain positions in public employment which are of such a nature as to require

extraordinary physical effort, or which for other reasons warrant consideration of age factors."

[Order 9, § 162-20-020, filed 9/23/71; Resolution, § 2, filed 10/18/63.]

WAC 162-20-030 Jurisdiction of commission. The human rights commission shall not exercise jurisdiction over any alleged unfair practice as to age when it appears that the respondent is acting under a law, ordinance or valid rule fixing or authorizing the establishment of reasonable minimum or maximum age limits with respect to candidates for public employment.

[Order 9, § 162-20-030, filed 9/23/71; Resolution, § 3, filed 10/18/63.]

WAC 162-20-040 Complaints concerning public employment. Complaints of candidates for public employment will be received in the manner provided by law and rule for the receipt of complaints in general.

[Resolution, § 4, filed 10/18/63.]

WAC 162-20-050 Duties of staff. When a complaint alleging age discrimination concerns a position in public employment, the commission's staff shall take the following steps before investigating and ascertaining the facts of the alleged act of discrimination:

(1) The staff shall determine whether the respondent is acting under a law or ordinance fixing or authorizing the establishment of age limits.

(2) If the staff finds that the respondent is not acting under a law or ordinance fixing or authorizing the establishment of age limits, the commission's staff shall proceed to process the complaint in the same manner as other complaints are processed, and in its findings the staff shall include a finding that the employer was not acting under a law or ordinance fixing or authorizing age limits.

(3) If the staff finds that the respondent had acted under a law or ordinance fixing or authorizing age limits it shall so report at the next commission meeting.

[Order 9, § 162-20-050, filed 9/23/71; Resolution, § 5, filed 10/18/63.]

WAC 162-20-060 Commission action. When the commission has received and accepted a report as provided in WAC 162-20-050(3) it shall dismiss the complaint for lack of jurisdiction.

[Order 9, § 162-20-060, filed 9/23/71; Resolution, § 6, filed 10/18/63.]

WAC 162-20-070 Primary jurisdiction. Unless the human rights commission should for good reason order otherwise, it will not act on any complaint concerning a position in public employment during the time while the complainant has an administrative review proceeding provided for his use by law, ordinance or valid rule by the respondent public agency or another public agency.

[Order 9, § 162-20-070, filed 9/23/71; Resolution, § 7, filed 10/18/63.]

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WAC 162-20-080 Pending complaints covered. These rules, being an interpretation of the jurisdiction of the commission, shall apply to pending complaints as well as to complaints filed after the effective date of these rules.

[Order 9, § 162-20-080, filed 9/23/71; Resolution, § 8, filed 10/18/63.]

Chapter 162-22 WAC EMPLOYMENT--HANDICAPPED PERSONS

WAC

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| 162-22-010 | Scope of chapter. |
| 162-22-020 | Definitions. |
| 162-22-030 | Affirmative action and reporting. |
| 162-22-040 | General approach to enforcement. |
| 162-22-050 | Unfair practice. |
| 162-22-060 | Preference for handicapped is not an unfair practice. |
| 162-22-070 | Bona fide occupational qualification. |
| 162-22-080 | Accommodation to handicapped employees. |
| 162-22-090 | Physician's opinions. |

WAC 162-22-010 Scope of chapter. This chapter contains rules interpreting and implementing the handicap discrimination coverage of RCW 49.60.180 (unfair practices of employers), RCW 49.60.190 (unfair practices of labor unions), and RCW 49.60.200 (unfair practices of employment agencies).

[Order 23, § 162-22-010, filed 7/21/75.]

WAC 162-22-020 Definitions. In this chapter the following words are used in the meaning given, unless the context clearly indicates another meaning:

"Handicap" is short for the statutory term "the presence of any sensory, mental, or physical handicap," see WAC 162-04-010, except when it appears as part of the full term.

An "able handicapped worker" is a person whose handicap does not prevent the proper performance of the particular job in question.

[Order 23, § 162-22-020, filed 7/21/75.]

WAC 162-22-030 Affirmative action and reporting.

(1) The commission will recognize a different definition of handicap for purposes of affirmative action and reporting than for purposes of law enforcement. The emphasis in law enforcement is to leave no one out. The emphasis in affirmative action must be to avoid including in so many persons that statistics become meaningless. None of us is a perfect sensory, mental, or physical specimen. Theoretically, every person faces the possibility of being discriminated against because of handicap—although some very remotely. It is therefore necessary to restrict the definition of handicap for purposes of affirmative action and reports on the use of handicapped workers to handicaps that are significant and permanent.

(2) An appropriate definition of handicap for affirmative action and reporting purposes is the following, which is already in use by the Washington state department of personnel:

"Handicapped: Persons with physical, mental, or sensory impairments that would impede that individual in obtaining and maintaining permanent employment and promotional opportunities. The impairments must be material rather than slight; static and permanent in that they are seldom fully corrected by medical replacement, therapy, or surgical means."

[Order 22, § 162-22-030, filed 5/23/75.]

WAC 162-22-040 General approach to enforcement. (1) For the purpose of determining whether an unfair practice under RCW 49.60.180, 49.60.190, or 49.60.200 has occurred:

(a) A condition is a "sensory, mental, or physical handicap" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be *handicapped* by a sensory, mental, or physical condition if he or she is *discriminated against because of the condition* and the condition is abnormal.

(b) "The presence of a sensory, mental, or physical handicap" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

(i) Is medically cognizable or diagnosable;

(ii) Exists as a record or history; or

(iii) Is perceived to exist, whether or not it exists in fact.

(2) An example of subsection (1)(b)(ii) is a medical record showing that the worker had a heart attack five years ago. An example of subsection (1)(b)(iii) is rejection of a person for employment because he had a florid face and the employer thought that he had high blood pressure, but in fact he did not have high blood pressure.

[Order 23, § 162-22-040, filed 7/21/75.]

WAC 162-22-050 Unfair practice. (1) RCW 49.60.180 says: "It is unfair practice for any employer:

"(1) To refuse to hire a person because of . . . the presence of any sensory, mental, or physical handicap, . . . : *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved."

(2) An unfair practice has been committed when both of the following have occurred:

(a) An employer, employment agency, or labor union has refused to hire or has otherwise discriminated against a person because the person has a handicap, and

(b) The handicap does not prevent the person from properly performing the particular job.

(3) While the proviso on ability to do the job appears only in paragraph (1) of RCW 49.60.180, it logically applies to all circumstances where ability to do the job is material. The rule of the proviso will therefore be applied when appropriate in cases arising under other paragraphs of RCW 49.60.180, and also in cases under

RCW 49.60.190 (labor unions), and RCW 49.60.200 (employment agencies).

[Order 23, § 162-22-050, filed 7/21/75.]

WAC 162-22-060 Preference for handicapped is not an unfair practice. The law against discrimination says that it is an unfair practice to discriminate *against* a person because of the presence of any handicap. Discrimination *in favor* of a person because of the person's handicap is not an unfair practice. Stating the same thing inversely, discrimination *against* a person because the person is *not handicapped* is not an unfair practice. This nonreciprocal operation is different from the operation of the statutes in all other areas, except for age discrimination. For example, it is an unfair practice for an employer to discriminate either for or against persons of any race or either sex.

[Order 23, § 162-22-060, filed 7/21/75.]

WAC 162-22-070 Bona fide occupational qualification. (1) The special rules in this section supplement the general rules on bona fide occupational qualification in WAC 162-16-020, 162-16-030, and 162-16-040.

(2) No bona fide occupational qualification question is raised by preferential treatment of handicapped persons, since such treatment is not an unfair practice. See WAC 162-22-060.

(3) A bona fide occupational qualification differs from the statutory requirement that the handicapped individual be able to properly perform the job. The determination of ability to do the job is made on an individual basis, for each person for each job. A bona fide occupational qualification is a requirement that must be met by all persons whether or not they can do the job. Ability to do the job is part of the definition of handicap discrimination; a bona fide occupational qualification is an exception to the rule of nondiscrimination because of handicap.

(4) The following job requirements are bona fide occupational qualifications:

(a) Any specific requirement set out in a statute of the United States or the state of Washington, or an authorized regulation of an agency of the United States government.

(b) Any specific requirement set out in an authorized regulation of an agency of the state of Washington, or in an ordinance, authorized rule, or other official act of a unit of local government of the state of Washington, unless the human rights commission finds that the state or local requirement is not consistent with the law against discrimination.

(5) The following are not bona fide occupational qualifications:

(a) Preferences or objections of co-workers, the employer, clients, or customers.

(b) Physical obstacles or inadequacies at work facilities that reasonably can be corrected as provided in WAC 162-22-080.

[Order 23, § 162-22-070, filed 7/21/75.]

WAC 162-22-080 Accommodation to handicapped employees. (1) It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

(2) It is an unfair practice for an employer to refuse to hire or otherwise discriminate against an able handicapped worker because the employer will be subject to the requirements of this section if the worker is hired, promoted, etc.

(3) The cost of accommodating an able handicapped worker will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, the requirements of other laws and contracts, and other appropriate considerations.

[Order 23, § 162-22-080, filed 7/21/75.]

WAC 162-22-090 Physician's opinions. (1) A physician's opinion on whether a handicap prevents a person from properly performing a particular job will be given due weight in view of all the circumstances, including the extent of the physician's knowledge of the particular person and job, and the physician's relationship to the parties.

(2) A physician's conclusion will not be considered to be an opinion on whether the person can properly perform the particular job unless it:

(a) Is based on the individual capabilities of the particular person, and not on generalizations as to the capabilities of all persons with the same handicap, unless the handicap is invariable in its disabling effect; and

(b) Is based on knowledge of the actual sensory, mental, and physical qualifications needed for proper performance of the particular job.

(3) Employers who choose to rely on a physician's opinion in determining that a person cannot properly perform the particular job are advised to provide the physician with the necessary information about the job and to inform the physician of the need for an individualized opinion.

[Order 23, § 162-22-090, filed 7/21/75.]

Chapter 162-26 WAC

PUBLIC ACCOMMODATIONS, HANDICAP DISCRIMINATION

WAC

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| 162-26-035 | Concurrent remedy in court. |
| 162-26-040 | Definitions. |
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| 162-26-100 | Structural barriers to accessibility. |
| 162-26-110 | Behavior causing risk. |
| 162-26-120 | Failure to meet requirements of other law. |
| 162-26-130 | Use of dog guide. |
| 162-26-140 | Unfair to request or require waiver of rights. |

WAC 162-26-010 Scope of chapter. (1) **Confined to unfair practice.** This chapter interprets and implements the handicap discrimination coverage of RCW 49.60-.215, unfair practices of places of public resort, accommodation, assemblage, amusement. This chapter does not define the scope of the civil right to be free from discrimination because of handicap declared in RCW 49.60.030 (quoted below in WAC 162-26-030) or interpret other statutes. This chapter applies to the unfair practices which the commission is empowered by RCW 49.60.120 to eliminate and prevent through the administrative process provided in RCW 49.60.230 through 49.60.270.

(2) **Language interpreted.** The language of RCW 49.60.215 that is interpreted and implemented by this chapter is:

"It shall be an unfair practice for any person or his agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of . . . the presence of any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind or deaf person: *Provided*, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a handicapped person except as otherwise required by law: *Provided*, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice."

(3) **Related regulations.** Regulations of the commission on handicap discrimination in real estate transactions are in chapter 162-38 WAC. Commission regulations governing handicap discrimination in employment are in chapter 162-22 WAC and in other regulations governing employment. General regulations of the commission governing schools are in chapter 162-28 WAC.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-010, filed 9/22/82.]

WAC 162-26-020 Purpose of chapter. (1) **Purpose.** The purpose of this chapter is to specify how the interpreted statute applies to specific circumstances and to established principles of interpretation that will guide in other circumstances.

(2) **Sources of policy.** The commission is guided by the policy of the legislature expressed in the statute being interpreted and in related statutes, particularly RCW 49.60.010, 49.60.030, and chapter 70.04 RCW,

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the "white cane law." The commission is also guided by the specialized knowledge and experience of its staff, particularly its disability specialists, and by the commissioners' own knowledge of the nature of handicap discrimination and the practical needs of the disabled. This includes the information gathered at hearings held in Spokane, Yakima, Lacey, and Seattle prior to the preparation of the first draft of these rules, and the written and oral comments received after circulation of proposed rules.

(3) **Legislative policy.** The principal expressions of legislative policy outside of the language being interpreted are the following:

RCW 49.60.010: "The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in . . . places of public resort, accommodation, or amusement . . . because of . . . the presence of any sensory, mental, or physical handicap; and the board (human rights commission) established hereunder is hereby given general jurisdiction and power for such purposes."

RCW 70.84.010: "The legislature declares:

"(1) It is the policy of this state to encourage and enable the blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled to participate fully in the social and economic life of the state, and to engage in remunerative employment.

"(2) As citizens, the blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled have the same rights as the able-bodied to the full and free use of the streets, highways, walkways, public buildings, public facilities, and other public places.

"(3) The blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities, and privileges on common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats, and all other public conveyances, as well as in hotels, lodging places, places of public resort, accommodation, assemblage or amusement, and all other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons."

RCW 28A.13.005: "It is the purpose of this chapter (certain education statutes) to ensure that all handicapped children . . . shall have the opportunity for an appropriate education at public expense as guaranteed to them by the constitution of this state."

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-020, filed 9/22/82.]

WAC 162-26-030 Related law. (1) **General civil right.** RCW 49.60.030 provides:

"(1) The right to be free from discrimination because of . . . the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

"(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;"

This right is enforceable through lawsuits in court (RCW 49.60.030(2)) but not through the administrative process of the human rights commission.

(2) **The "white cane law."** Chapter 70.84 RCW prohibits the refusal of service to or the exaction of an extra charge from any blind or hearing impaired person because the person is accompanied by a guide dog. RCW 70.84.030. The chapter imposes special duties on a driver who approaches a blind pedestrian with a white cane or a blind or hearing impaired pedestrian using a guide dog. RCW 70.84.040. Blind, partially blind, and hearing impaired pedestrians are declared to have all the rights and privileges conferred by law on other persons in any of the places, accommodations, or conveyances listed in RCW 70.84.010 (quoted above in WAC 162-26-020(2)). RCW 70.84.050.

(3) **Other laws.** Other state laws define rights of the handicapped in particular circumstances. Some are referred to elsewhere in this chapter. Some accommodations are subject to United States law, particularly sections 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-030, filed 9/22/82.]

WAC 162-26-035 Concurrent remedy in court. Courts have jurisdiction under RCW 49.60.030(2) to remedy violations of RCW 49.60.215 as interpreted and implemented by this chapter, concurrently with the commission. When the commission learns that an action on the same facts has been filed in court, the commission will ordinarily administratively close the case before it, as provided in WAC 162-08-062(3).

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-035, filed 9/22/82.]

WAC 162-26-040 Definitions. (1) **Place of public accommodation.** RCW 49.60.040 gives the following definition:

"'Any place of public resort, accommodation, assemblage, or amusement' includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and

the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: *Provided*, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;"

(2) **General definitions.** General definitions applicable throughout the commission's regulations are set out in WAC 162-04-010. These include the following:

"Handicap" is short for the term 'the presence of any sensory, mental, or physical handicap' used in the law against discrimination, and means the full term."

(3) **Definitions special to this chapter.** The following words or phrases are used in this chapter in the meaning given, unless the context clearly indicates another meaning.

"Accessible" means usable or understandable by a person who is handicapped, with reasonable effort and in reasonable safety.

"Arranged service" means making the services or goods of a place of public accommodation available to a handicapped person at a place or in a way that is different from the place or way that the service is offered to the public in general in order to serve the person. See WAC 162-26-090.

"Dog guide" means a trained dog guide used by a blind or deaf person. See WAC 162-26-130.

"Fair service" means the service required by RCW 49.60.215 for handicapped persons in places of public accommodation. Depending on the circumstances, fair service may be in the form of (a) same service, (b) reasonable accommodation, or (c) arranged service. These terms are defined in this chapter. See also "service" and "fairly serve."

"Fairly serve" means to provide fair service.

"Place of public accommodation" is short for "place of public resort, accommodation, assemblage, or amusement" and means the full term.

"Reasonable accommodation" means action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person's sensory, mental, or physical limitations. See WAC 162-26-080.

"Same service" means service without regard to the existence of a handicap. See WAC 162-26-060.

"Service" means everything available to persons from a place of public accommodation.

"Structural" is defined in WAC 162-26-100(5).

"Unfair service" means service not in compliance with RCW 49.60.215. See "fair service."

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-040, filed 9/22/82.]

WAC 162-26-050 Who is protected. (1) **Statute.** RCW 49.60.215 requires service in places of public accommodation "regardless of . . . the presence of any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind or deaf person. . . ."

(2) **What is a handicap.** A person's condition is a "sensory, mental, or physical handicap" if it is abnormal and is a reason why the person was not fairly served in a place of public accommodation. A person is *handicapped* by a sensory, mental, or physical condition if she or he is not fairly served because of the condition. The law protects all persons from unfair service because of handicap, whether the handicap is severe or slight.

(3) **When handicap is present.** The presence of a sensory, mental, or physical handicap includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

- (a) Is medically cognizable or diagnosable;
- (b) Exists as a record or history; or
- (c) Is perceived to exist, whether or not it exists in fact.

(4) **Person using dog guide.** WAC 162-26-130 defines who is protected as a person using a trained dog guide.

(5) **Nonhandicapped not protected.** The law protects against discrimination because of the "presence" of a handicap. It does not prohibit treating handicapped persons more favorably than nonhandicapped persons. Compare WAC 162-22-060 (employment).

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-050, filed 9/22/82.]

WAC 162-26-060 General principles. (1) **Same service preferred.** The purposes of the law against discrimination are best achieved when handicapped persons are treated the same as if they were not handicapped. The legislature expresses this policy in RCW 49.60.215 with the words "regardless of." Persons should, if possible, be treated without regard to their handicap or use of a dog guide. This is called "same service" in this chapter.

(2) **Reasonable accommodation.** In some circumstances, however, treating handicapped persons the same as nonhandicapped persons (same service) will defeat the purposes of the law against discrimination. This would be true if persons in wheelchairs and nonhandicapped persons are equally entitled to use the stairway to reach the second floor of a store. In such circumstances, the operator of the place of public accommodation should if possible use the next best solution: Reasonable accommodation. A reasonable accommodation would be to permit the shopper in the wheelchair to use an elevator

to reach the second floor, even though the public in general is not permitted to use the elevator. Reasonable accommodation is explained in WAC 162-26-080.

(3) **Arranged service.** Where same service will not carry out the purposes of the law and where no accommodation is reasonable, the operator of a place of public accommodation should use the third best solution: Arranged service. In the example used in this section, arranged service would be having a store employee bring merchandise of the size and description requested by the wheelchair shopper from the second floor for examination by the customer on the first floor. This would be appropriate if there were no elevator and no other safe and dignified way to transport the customer to the second floor. Arranged service is explained in WAC 162-26-090.

(4) **Overall objective.** In applying RCW 49.60.215, the commission seeks to assure that handicapped persons will have the enjoyment of places of public accommodation to the greatest extent practical. The legislature in RCW 49.60.040 has defined "full enjoyment of" with respect to the civil right set out in places of public accommodation in RCW 49.60.030 as follows:

"Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons . . . with any sensory, mental, or physical handicap, or a blind or deaf person using a trained dog guide, to be treated as not welcome, accepted, desired, or solicited;"

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-060, filed 9/22/82.]

WAC 162-26-070 General rules. (1) **Rules.** Except where exempted by RCW 49.60.215 or excepted by ruling of the commissioners under WAC 162-06-030, it is an unfair practice under RCW 49.60.215 for any person in the operation of a place of public accommodation, because of handicap or use of a dog guide:

- (a) To refuse to serve a person;
- (b) To charge for reasonably accommodating the special needs of a handicapped person, or for arranged service as defined in this chapter;
- (c) To treat a handicapped person as not welcome, accepted, desired, or solicited the same as a nonhandicapped person;
- (d) To segregate or restrict a person or deny a person the use of facilities or services in connection with the place of public accommodation where same service is possible without regard to the handicap;
- (e) To fail to reasonably accommodate the known physical, sensory, or mental limitations of a handicapped person, when same service would prevent the person from fully enjoying the place of public accommodation, as provided in WAC 162-26-080; or
- (f) To fail to arrange service under the rules in WAC 162-26-090 when reasonable accommodation is not possible and same service treatment would prevent the

handicapped person from fully enjoying the place of public accommodation.

(2) **Exceptions may be granted.** The commission will grant exceptions to the rules of this chapter under the standards set out in WAC 162-06-030.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-070, filed 9/22/82.]

WAC 162-26-080 Reasonable accommodation. (1) **Unfair to not accommodate.** It is an unfair practice for a person in the operation of a place of public accommodation to fail to make reasonable accommodation to the known physical, sensory, or mental limitations of a handicapped person, when same service would prevent the person from fully enjoying the place of public accommodation.

(2) **Defined.** "Reasonable accommodation" is action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person's sensory, mental, or physical limitations.

(3) **Reasonableness.** Whether a possible accommodation is reasonable or not depends on the cost of making the accommodation, the size of the place of public accommodation, the availability of staff to make the accommodation, the importance of the service to the handicapped person, and other factors bearing on reasonableness in the particular situation.

(4) **Carrying not favored.** Carrying a mobility-impaired person is not required by law and is not an acceptable accommodation, except in rare circumstances. Carrying should be done only when there is no other way for the mobility-impaired person to use the facility and when it is agreeable to the handicapped person.

(5) **Reference to employment standard.** The concept of reasonable accommodation is also used in the employment context. The commission will rely on its interpretations of WAC 162-22-080 and on *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978) for guidance in applying this section.

[Statutory Authority: RCW 49.60.120(3). 83-02-012 (Order 43), § 162-26-080, filed 12/23/82.]

WAC 162-26-090 Arranged service. (1) **Unfair to deny.** No person shall be denied the enjoyment of a place of public accommodation because the facilities are not accessible to the person and cannot be made accessible with reasonable accommodation, when the desired service can be made available under the standards for arranged service that are specified in this section.

(2) **Defined.** "Arranged service" means making the services or goods of a place of public accommodation available to a handicapped person at a place or in a way that is different from the place or way that the service is offered to the public in general, in order to serve the person.

(3) **Limitation on use.** Arranged service is fair only when neither same service nor reasonable accommodation is possible, and the choice is between arranged service and no service.

(4) **Choice of means of arranged service.** The operator of a place of public accommodation may choose the place and means of providing arranged service so long as the operator gives reasonable weight to the convenience, needs, and dignity of the handicapped person seeking service. Among available means or places, the one that most closely approximates service to the general public should be chosen. There is no need for the operator to deliver the services away from the place of public accommodation if the services can be made available somewhere at the place of public accommodation.

(5) **Examples.**

(a) In a retail setting, goods can be carried from an inaccessible location to an accessible location, as described in WAC 162-26-060(3).

(b) In an office setting, interviewers and forms could be brought to an accessible office or conference room in the building or at another place, although the particular business would ordinarily be done at an inaccessible location.

(c) In an office setting, arrange to interview a mentally handicapped person in place of requiring a written application or report.

(d) In an entertainment setting, seating areas made available for patrons in wheelchairs would be arranged service.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-26-090, filed 9/22/82.]

WAC 162-26-100 Structural barriers to accessibility. (1) **Statute.** RCW 49.60.215 says that it

"shall not be construed to require structural changes, modifications, or additions to make any place accessible to a handicapped person except as otherwise required by law. . . ."

(2) **Laws requiring accessibility.** The principal laws requiring that places be made accessible are:

(a) The state building code, chapter 19.27 RCW, which includes the barrier free design standards adopted in chapter 51-10 WAC under authority of chapter 70.92 RCW. The barrier free design standards apply with some exceptions to "buildings, structures, or portions thereof, . . . which are constructed, substantially remodeled, or substantially rehabilitated after October 1, 1976." WAC 51-10-003.

(b) Chapter 219, Laws of 1971 ex. sess., in effect from August 9, 1971, through June 30, 1976. This statute required that plans and specifications for the erection or remodeling of any public accommodation must provide for access by physically handicapped persons, for toilet facilities designed for use by the physically handicapped, and for additional facilities specified in a national standard.

(c) Chapter 35, Laws of 1967, in effect from June 8, 1967, through June 30, 1976. This statute was substantially the same as the 1971 statute described in paragraph (b) of this subsection, but was limited in its coverage to public buildings.

(d) RCW 35.68.075, requiring curb ramps in sidewalks constructed or replaced after June 7, 1973.

(e) United States law; particularly 45 CFR § 84.23 implementing section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), which requires that facilities constructed after April 28, 1977 with federal assistance be readily accessible to and usable by handicapped persons.

(3) **Practices that are not unfair.** It is not an unfair practice under RCW 49.60.215 to operate a place of public accommodation with structural barriers to accessibility of the handicapped when the structural barriers were lawful when constructed and are presently lawful under the state building code and other law outside of the law against discrimination. This exemption does not relieve the operator of a place of public accommodation of the duty to make reasonable accommodation to the needs of handicapped persons as described in WAC 162-26-080, or to provide arranged service as described in WAC 162-26-090.

(4) **When required by law.** It is an unfair practice under RCW 49.60.215:

(a) To deny service to any person because of a barrier to accessibility when accessibility is required by law;

(b) To build or remodel in a way that does not comply with requirements of law on accessibility;

(c) To operate a place of public accommodation that is out of compliance with a law requiring accessibility;

(d) To fail to maintain or fail to continue the accessibility of a place of public accommodation that was required by law to be accessible when it was built, remodeled, or rehabilitated.

(5) **Nonstructural changes.** After January 1, 1983, it is an unfair practice under RCW 49.60.215 for a person who is making nonstructural changes in a place of public accommodation to fail to eliminate barriers to same service when this can be done without substantially changing the scope or cost of the project or requiring structural changes that are not otherwise required by law. Specifically, it is an unfair practice:

(a) When installing a nonstructural fixture or component, to choose and install one that is not accessible to the handicapped or that makes the place of public accommodation less accessible to the handicapped.

(b) When replacing a nonstructural fixture or component, to replace it with one that is not accessible to the handicapped or one that makes the place of public accommodation less accessible to the handicapped.

(c) When relocating a nonstructural fixture or component, to relocate it to a place that is not accessible to the handicapped, unless no suitable place is accessible.

(d) When modifying a nonstructural fixture or component, to do so in a way that does not eliminate barriers to the handicapped, when possible.

(6) **What is "structural."** "Structural" for purposes of RCW 49.60.215 means the load-bearing members and essential structure or composition of a place, as distinguished from its finish, decorations, or fittings. Examples of structural components are floors, walls, stairs, door openings, sidewalks, elevators, and escalators. Examples of things that are not structural are moveable walls, bathroom fixtures and partitions, fixtures such as water fountains (whether or not attached to a wall),

doors and door hardware, cabinets, counters, handrails, signs (attached or painted), elevator controls, alarm systems, and carpeting or other floor covers.

[Statutory Authority: RCW 49.60.120(3), 83-02-012 (Order 43), § 162-26-100, filed 12/23/82.]

WAC 162-26-110 Behavior causing risk. (1) **Proviso interpreted.** This section interprets the following proviso of RCW 49.60.215:

"*Provided*, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice."

(2) **General rule.** It is not an unfair practice under RCW 49.60.215 to deny a person service in a place of public accommodation because that person's behavior or actions constitute a risk to property or other persons.

(3) **Individual judgment required.** To come within this exception, the denial of service must be based on knowledge of the present behavior or actions of the individual who is not served. It is an unfair practice to exclude all persons who have a handicap or who have a particular handicap unless the operator of the place of public accommodation can show that all persons with the handicap will present a risk to persons or property.

(4) **Likelihood of injury.** Risk to property or other persons must be immediate and likely, not remote or speculative.

(5) **Degree of risk.** Risk of injury to persons may be given more weight than risk of injury to property. Risk of severe injury may be given more weight than risk of slight injury.

(6) **Risk to handicapped person.** Risk to the handicapped person is not a reason to deny service. Liability for injury to handicapped customers is governed by law other than the law against discrimination. The law against discrimination affects tort liability only insofar as it includes handicapped persons within the public for which public accommodations must be made safe.

(7) **Annoyance to staff or other customers.** Annoyance on the part of staff or customers of the place of public accommodation at the abnormal appearance or behavior of a handicapped person is not a "risk to property or other persons" justifying nonservice.

(8) **Least discriminatory solution required.** It is an unfair practice to deny a handicapped person the enjoyment of an entire place of public accommodation because the person presents a risk of injury when using part of the place. When risk justifies not serving a handicapped person in the same way or same place as other customers, the person should be served through reasonable accommodation (WAC 162-26-060, 161-26-080 [162-26-080]) or arranged service (WAC 162-26-060, 162-260-090), if possible.

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-26-110, filed 9/22/82.]

WAC 162-26-120 Failure to meet requirements of other law. (1) **Unfair practice.** It is an unfair practice under RCW 49.60.215 for the operator of a place of public accommodation to refuse or fail to comply with

any specific requirement of law for the benefit of handicapped persons applicable to the place of public accommodation.

(2) **All sources of law covered.** This section applies to all requirements imposed by or authorized by any law of the United States, the state of Washington, or any ordinance of a unit of local government within the state of Washington.

(3) **References to selected laws.** Some of the laws to which this section applies are:

(a) Chapter 28A.13 RCW (education for handicapped children);

(b) Sections 503 and 504 of the United States Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794, and all regulations of agencies of the United States government issued pursuant to them;

(c) Chapter 70.84 RCW, the "white cane law."

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-26-120, filed 9/22/82.]

WAC 162-26-130 Use of dog guide. (1) **Coverage of statute.** RCW 49.60.215 requires fair service in a place of public accommodation "regardless of . . . the use of a trained dog guide by a blind or deaf person . . ." as well as because of handicap itself.

(2) **Same rules apply.** All of the rules of this chapter with respect to handicap itself apply equally to service of a blind or deaf person who is using a trained dog guide. See particularly WAC 162-26-060 and 162-26-070.

(3) **Standards of "white cane law" apply.** It is an unfair practice under RCW 49.60.215 for the operator of a place of public accommodation to deny any person the following rights set out in the "white cane law," RCW 70.84.030:

"Every totally or partially blind or hearing impaired person shall have the right to be accompanied by a guide dog in any of the places listed in RCW 70.84.010(3) without being required to pay an extra charge for the guide dog. It shall be unlawful to refuse service to a blind or hearing impaired person in any such place solely because he is accompanied by a guide dog."

(4) **"Dog guide" defined.** For purposes of RCW 49.60.215 the term "dog guide" means a trained dog guide used by a blind or deaf person. It has the same meaning as "guide dog" in RCW 70.84.020:

". . . the term 'guide dog' shall mean a dog which is in working harness and is trained or approved by an accredited school engaged in training dogs for the purpose of guiding blind persons or a dog which is trained or approved by an accredited school engaged in training dogs for the purpose of assisting hearing impaired persons."

(5) **Identification of trained dog guide.** A trained dog guide used by a blind person is identified by the harness with rigid stirrup for the hand of the guided person that such dogs wear when in service. A trained dog guide used by a deaf person shall be identified by a credential presented by the deaf person on request, or by a tag or other identifying device that is adopted and promulgated so as to become generally known.

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-26-130, filed 9/22/82.]

WAC 162-26-140 Unfair to request or require waiver of rights. It is an unfair practice for any person to request or require another person to waive rights or hold anyone harmless as a condition of the use or enjoyment of a place of public accommodation by a handicapped person. This section is intended to prohibit waivers on the basis of handicap, but is not intended to preclude waivers required on a nondiscriminatory basis.

[Statutory Authority: RCW 49.60.120(3), 83-02-012 (Order 43), § 162-26-140, filed 12/23/82.]

Chapter 162-28 WAC

PUBLIC SCHOOLS—EQUAL EDUCATION— EQUAL RIGHTS—NATIONAL ORIGIN MINORITY GROUP CHILDREN

WAC

162-28-030 Schools are places of public accommodation.
162-28-040 Equal educational opportunity for children who are limited in English language skills because of national origin.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

162-28-010 Purpose. [Rule (part), filed 6/15/67.] Repealed by Order 9, filed 9/23/71.
162-28-020 Definitions—Policy objectives. [Rule (part), filed 6/15/67.] Repealed by Order 9, filed 9/23/71.

WAC 162-28-030 Schools are places of public accommodation. All schools and other educational facilities in the state of Washington, public or private, except those operated or maintained by a bona fide religious or sectarian institution, are "places of public resort, accommodation, assemblage or amusement" for purposes of the Washington state law against discrimination, chapter 49.60 RCW. See the definition of the quoted term in RCW 49.60.040.

(2) This means that it is an unfair practice under RCW 49.60.215 for nonexempt schools or educational facilities or their agents or employees

"to commit any act which directly or indirectly results in any distinction, restriction or discrimination or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging . . . except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, or national origin."

(3) This public accommodations section of the law against discrimination applies to schools in their relationship with students and potential students and their parents, and with members of the public who seek to use school facilities or who have an interest in how school facilities are used. Other sections of the law against discrimination govern schools in their relationship to employees (e.g. RCW 49.60.180), to those with whom schools have real estate transactions (e.g. RCW 49.60.222), and to others. RCW 49.60.030 declares a general

civil right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental or physical handicap. Public schools are governed by Article IX, section 1 (equal education) and Article XXXI (Amendment 61) (equal rights) of the Washington constitution and various federal and state statutes on equal treatment of the races and sexes, in addition to the law against discrimination.

[Order 17, § 162-28-030, filed 6/28/74.]

WAC 162-28-040 Equal educational opportunity for children who are limited in English language skills because of national origin. (1) It is an unfair practice under RCW 49.60.215 for a school or educational institution covered by that section to fail or refuse to provide equal educational opportunity to children who are deficient in English language skills because of their national origin. Schools attended by such children shall meet the following standards:

(a) Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

(b) The affirmative steps taken under part (a) shall build competency in the English language without detriment to the children's skills in other languages, and without impairing or suppressing the children's cultural identity and heritage. The steps may include bilingual-bicultural education. The appropriateness of particular action will depend in part on whether the school or educational institution has many children or only a few children who require the steps. Nothing in this section is intended to preclude inclusion in the program of children who are deficient in the English language for reasons other than their national origin where that is compatible with the purposes of this section.

(c) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(d) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.

(e) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

(2) This section is intended to be consistent with the requirements of section 601 the United States Civil Rights Act of 1964, 42 USC section 2000d, and the

regulations of the United States Department of Health, Education and Welfare, 45 CFR Part 80, and HEW guidelines to selected school districts dated 10 July 1970, 35 Fed. Reg. 11595, as interpreted in *Lau v. Nichols*, 39 L. ed 2d 1, 94 S. Ct. -----, (1974). Parts (a), (c), (d), and (e) of paragraph (1) are taken verbatim from the 10 July 1970 HEW guideline.

[Order 17, § 162-28-040, filed 6/28/74.]

Chapter 162-30 WAC SEX DISCRIMINATION

WAC

162-30-010 General approach.
162-30-020 Maternity.

WAC 162-30-010 General approach. In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC § 2000e and following, where the federal act is comparable to the state act. See in particular part 1604 of the regulations of the United States Equal Employment Opportunity Commission, 42 [29] CFR Part 1604. The commission will not follow federal precedents where it believes that a different interpretation will better carry out the purposes of the state act.

[Order 9, § 162-30-010, filed 9/23/71.]

WAC 162-30-020 Maternity. (1) **FINDINGS.** Pregnancy is an expectable incident in the life of a woman. Many women of childbearing age depend on their jobs for economic support. Practices such as terminating pregnant women, refusing to grant leave or accrued sick pay for disabilities relating to pregnancy, or refusing to hire women for responsible jobs because they may become pregnant, impair the opportunity of women to obtain employment and to advance in employment on the same basis as men. Such practices discriminate against women because of their sex.

(2) **PURPOSES.** The purpose of the law against discrimination in employment because of sex (chapter 49-.60 RCW) is to equalize employment opportunity for men and women. This regulation explains how the law applies to practices which disadvantage women because of pregnancy or childbirth.

(3) **HIRING PREGNANT WOMEN.** It is an unfair practice for an employer to refuse to hire a qualified woman because of pregnancy unless doing so would be unreasonable in view of the necessities of the business. The burden shall be on the employer to show that a decision not to hire a pregnant woman was based on adequate facts concerning her individual ability to perform the job or adequate facts concerning business necessity. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during

those first two months. On the other hand, negative assumptions about pregnant women in employment must not influence the hiring decision. Such assumptions include but are not limited to:

(a) That pregnant women do not return to the job after childbirth;

(b) That the time away from work required for childbearing will increase the employer's costs;

(c) That the disability period for childbirth will be unreasonably long;

(d) That pregnant women are frequently absent from work due to illness;

(e) That clients, co-workers, or customers object to pregnant women on the job.

(4) **TREATMENT OF EMPLOYED WOMEN.** It is an unfair practice for an employer to discharge a woman, penalize her in terms or conditions of employment, or in any way limit the job opportunities of a woman because she is pregnant or may require time away from work for childbearing.

(5) **LEAVE FOR TEMPORARY DISABILITY.**

(a) An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth. A leave in excess of the actual period of sickness or disability is not required by the law or this regulation. The terms and conditions of the leave shall be determined by the employer's policy on temporary disability, unless the policy conflicts with this regulation. For example:

(i) If advance notice is required for a leave for planned surgeries, or other anticipated disabilities, it may be required also for a leave for childbirth;

(ii) If the uniform policy requires a physician's statement to verify the leave period for other disabilities, a physician's statement may be required to verify the leave period for disabilities relating to pregnancy or childbirth.

(b) While application of the employer's general leave policy to disability because of pregnancy or childbirth will ordinarily afford equal opportunity for women and men, there may be circumstances when this is not so. One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.

(c) An employer shall allow a woman to return to the same job, or a similar job of at least the same pay, if she has taken a leave of absence only for the actual period of disability relating to pregnancy or childbirth. Refusal to do so must be justified by adequate facts concerning business necessity.

(6) **DISABILITY BENEFITS.** Illness or disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are temporary disabilities and must be treated as such under any sick leave plan or temporary disability benefit plan provided in whole or in part by the employer. All written and unwritten policies and practices concerning disabilities must be applied to disabilities resulting from pregnancy or childbirth on the same terms and conditions as they

are applied to other temporary disabilities. For example, if the following benefits or privileges are available for other temporary disabilities, then they must be available also for disabilities resulting from pregnancy or childbirth:

(a) Payment in lieu of wages under a sick leave plan or temporary disability benefit plan. (If no leave pay is granted for other temporary disabilities, then it need not be granted for disabilities relating to pregnancy or childbirth.)

(b) Extensions of leave time (e.g., use of vacation or leave without pay);

(c) Retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period.

(7) **INSURANCE BENEFITS.** Insurance benefits provided by the employer must be equal for male and female employees. For example:

(a) If full health insurance coverage is provided for male employees, then full coverage, including maternity and abortion, must be provided for female employees;

(b) If maternity insurance is provided for the wives of male employees, then the same coverage must be provided for the female employees.

Subsection 7 applies only if the employer pays the premium in whole or in part or has participated in negotiating the terms of the insurance policy.

(8) **MARITAL STATUS IMMATERIAL.** Discrimination because of marital status is an unfair practice. An employer's leave policies and benefits, including health insurance, must apply equally to married and unmarried employees.

(9) **LABOR UNIONS AND EMPLOYMENT AGENCIES.** It is an unfair practice for a labor union or employment agency to conduct its own affairs so as to deny anyone his or her rights under the law and this regulation.

(10) **COMMISSION RULINGS.** Any person in doubt as to the application of this regulation to a particular set of facts may request an opinion letter from the executive secretary of the Washington state human rights commission or a declaratory ruling of the commission under WAC 162-08-620.

(11) **CONSTRUCTION WITH FEDERAL LAW.** This regulation is intended to be consistent with Title VII of the United States Civil Rights Act of 1964 and the United States Equal Employment Opportunity Commission Employment Policies Relating to Pregnancy and Childbirth, 29 CFR § 1604.10, and shall be construed accordingly.

[Order 15, § 162-30-020, filed 9/28/73; Order 11, § 162-30-020, filed 6/26/72.]

Chapter 162-36 WAC REAL ESTATE TRANSACTIONS

WAC

162-36-010 Soliciting buyers from neighbors of listed house.
162-36-020 Content of solicitation.

(1986 Ed.)

WAC 162-36-010 Soliciting buyers from neighbors of listed house. Some real estate firms have a practice of sending letters, post cards or printed circulars to residents of a neighborhood where they have a home listed for sale in order to obtain referrals of prospective buyers of the home. Such a practice does not necessarily discriminate against persons on the basis of race, creed, color, national origin, sex, or marital status. However, the practice can have a discriminatory effect where:

(1) It is used only in neighborhoods occupied entirely or predominantly by persons of a single race, creed, color, national origin, sex, or marital status, or

(2) Persons of a particular race, creed, color, national origin, sex, or marital status living in the same neighborhood are not sent solicitations, or

(3) The solicitation is worded so as to suggest that the recipient can control the character or type of person to whom the property will be sold.

Use of the neighborhood solicitations under the above circumstances or in the above manner is an unfair practice under RCW 49.60.222.

Further rules on the content of the neighborhood solicitations are given in WAC 162-36-020.

[Order 14, § 162-36-010, filed 7/16/73.]

WAC 162-36-020 Content of solicitation. Residential segregation on the basis of race, creed, and other considerations is rooted in the history of this country and fixed in the patterns of thought of many person. The wording of a solicitation of names of prospective purchasers directed to neighbors of a house listed for sale, must be examined in this context. A solicitation which indicates that the recipient can control the type of persons who will move into the neighborhood by referring appropriate prospective buyers, is likely to be understood as an invitation to discriminate on the basis of race, creed, color, national origin, sex or marital status. Phrases such as "uphold the standards of the community" (when the "standards" are unspecified) are likely to be understood the same way. Accordingly, it is an unfair practice under RCW 49.60.222 and WAC 162-36-010 to word a neighborhood solicitation so that it:

(1) Suggests in any way that the solicitor or the buyer or seller, or any one or more of them, has the power to control the type or character of the person or persons to whom the property involved may be sold;

(2) Invites or provokes discriminatory feelings, actions, or responses from the person or persons being solicited;

(3) Makes reference to an assumed standard of the community which the solicitor, buyer or seller must or will uphold, unless the particular community standard is identified specifically, and the standard does not have the effect of excluding persons of a particular race, creed, color, national origin, sex, or marital status.

[Order 14, § 162-36-020, filed 7/16/73.]

[Title 162 WAC—p 55]

Chapter 162-38 WAC
REAL ESTATE TRANSACTIONS, HANDICAP
DISCRIMINATION

WAC

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WAC 162-38-010 Scope of chapter. (1) **Confined to unfair practice.** This chapter interprets and implements the handicap discrimination coverage of the sections of the law against discrimination governing unfair practices in real estate transactions, RCW 49.60.222, 49.60.223, 49.60.224, 49.60.225, and 49.60.226. This chapter does not define the scope of the civil right to be free from discrimination because of handicap declared in RCW 49.60.030 (quoted in WAC 162-38-030) or interpret other statutes. This chapter applies to the unfair practices which the commission is empowered by RCW 49.60.120(4) to eliminate and prevent through the administrative process provided in RCW 49.60.230 through 49.60.270.

(2) **Principal statute interpreted.** The legislation principally interpreted in this chapter is the following portion of RCW 49.60.222:

"It is an unfair practice for any person, whether acting for himself or another, because of . . . the presence of any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind or deaf person:

"(1) To refuse to engage in a real estate transaction with a person;

"(2) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

"(3) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

"(4) To refuse to negotiate for a real estate transaction with a person;

"(5) To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his attention, or to refuse to permit him to inspect real property;

"(6) To print, circulate, post, or mail, or cause to be so published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;

"(7) To offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith;

"(8) To expel a person from occupancy of real property;

"(9) To discriminate in the course of negotiating, executing, or financing a real estate transaction whether by mortgage, deed of trust, contract, or other instrument imposing a lien or other security in real property, or in negotiating or executing any item or service related thereto including issuance of title insurance, mortgage insurance, loan guarantee, or other aspect of the transaction. . . . ; or

"(10) To attempt to do any of the unfair practices defined in this section.

" . . .
 "This section shall not be construed to require structural changes, modifications, or additions to make facilities accessible to a handicapped person except as otherwise required by law. Nothing in this section affects the rights and responsibilities of landlords and tenants pursuant to chapter 59.18 RCW."

(3) **Related regulations.** Regulations of the commission on handicap discrimination in public accommodations are in chapter 162-26 WAC. Commission regulations governing handicap discrimination in employment are in chapter 162-22 WAC and other regulations governing employment. General regulations governing unfair practices in real estate transactions are in chapter 162-36 WAC. Regulations governing credit transactions are in chapter 162-40 WAC.

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-38-010, filed 9/22/82.]

WAC 162-38-020 Purpose of chapter. (1) **Purpose.** The purpose of this chapter is to specify how the interpreted statutes apply to specific circumstances and to established principles of interpretation that will guide in other circumstances.

(2) **Sources of policy.** The commission is guided by the policy of the legislature expressed in the statute being interpreted and in related statutes, particularly RCW 49.60.010, 49.60.030 and 70.92.100, quoted below in subsection (3) of this section.

(3) **Legislative policy.** The principal expressions of legislative policy outside of the language being interpreted are the following:

RCW 49.60.010: "The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in . . . real property transactions because of . . . the presence of any sensory, mental, or physical handicap; and the board (human rights commission) established

hereunder is hereby given general jurisdiction and power for such purposes."

RCW 70.92.100 (effective July 1, 1976): "It is the intent of the legislature that, notwithstanding any law to the contrary, plans and specifications for the erection of buildings through the use of public or private funds shall make special provisions for elderly or physically disabled persons."

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-020, filed 9/22/82.]

WAC 162-38-030 Related law. (1) General civil right. RCW 49.60.030 provides:

"(1) The right to be free from discrimination because of . . . the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

"(c) The right to engage in real estate transactions without discrimination;"

(2) **State Building Code.** The State Building Code, chapter 19.27 RCW, includes by reference the barrier free design standards, chapter 51-10 WAC. RCW 19.27.030(5). These standards were established under authority of chapter 70.92 RCW. With some exceptions, they apply to "buildings, structures, or portions thereof, . . . which are constructed, substantially remodeled, or substantially rehabilitated after October 1, 1976." WAC 51-10-003.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-030, filed 9/22/82.]

WAC 162-38-035 Concurrent remedy in court. Courts have jurisdiction under RCW 49.60.030(2) to remedy violations of RCW 49.60.222, 49.60.223, and 49.60.224 as interpreted and implemented by this chapter, concurrently with the commission. When the commission learns that an action on the same facts has been filed in court, the commission will administratively close the case before it in compliance with RCW 49.60.226 and WAC 162-08-062(2).

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-035, filed 9/22/82.]

WAC 162-38-040 Definitions. (1) Real estate transaction. RCW 49.60.040 gives the following definitions:

"'Real property' includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

"'Real estate transaction' includes the sale, exchange, purchase, rental, or lease of real property."

(2) **General definitions.** General definitions applicable throughout the commission's regulations are set out in WAC 162-04-010. These include the following:

"'Handicap' is short for the term 'the presence of any sensory, mental, or physical handicap' used in the law against discrimination, and means the full term."

(3) **Definitions special to this chapter.** The following words or phrases are used in this chapter in the meaning

given, unless the context clearly indicates another meaning.

"Accessible" means usable or understandable by a person who is handicapped, with reasonable effort and in reasonable safety.

"Barrier free design standards" means chapter 51-10 WAC, setting of barrier free design standards making building and facilities accessible to physically disabled persons, a component of the state building code. See WAC 162-38-030(2), 162-38-070.

"Dog guide" means a trained dog guide used by a blind or deaf person. See WAC 162-38-100.

"Landlord" means anyone other than the occupant of real property who attempts to control use of the property under claim of right arising out of an ownership interest in real property by that person or another person for whom that person acts. The term includes owners of rental property, trustees, receivers, persons controlling the common areas used in connection with condominiums, and agents or others acting in the interest of any such persons.

"Rental property" includes real property that is rented or leased, offered for rental or lease, or built or maintained for rental or lease.

"Structural" is defined in WAC 162-38-070(5).

"Tenant" is a person who rents or seeks to rent real property.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-040, filed 9/22/82.]

WAC 162-38-050 Who is protected. (1) Statutes. RCW 49.60.222 defines practices in connection with real estate transactions that are unfair when done because of "the presence of any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind or deaf person." RCW 49.60.223 and 49.60.224 are worded similarly with respect to handicap.

(2) **What is a handicap.** A person's condition is a "sensory, mental, or physical handicap" if it is abnormal and is a reason why the person was not treated fairly in a real estate transaction. A person is *handicapped* by a sensory, mental, or physical condition if she or he is *discriminated against* because of the condition. The law protects all persons from discrimination because of handicap, whether the handicap is severe or slight.

(3) **When handicap present.** The presence of a sensory, mental, or physical handicap includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

(a) Is medically cognizable or diagnosable;

(b) Exists as a record or history; or

(c) Is perceived to exist, whether or not it exists in fact.

(4) **Person using dog guide.** WAC 162-38-100 defines who is protected as a person using a trained dog guide.

(5) **Nonhandicapped not protected.** The law protects against discrimination because of the "presence" of a handicap. It does not prohibit treating handicapped persons more favorably than nonhandicapped persons. Compare WAC 162-22-060 (employment).

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-050, filed 9/22/82.]

WAC 162-38-060 General rules. (1) **General principles apply.** The unfair practices in real estate transactions defined in RCW 49.60.222 apply to race discrimination, sex discrimination, and other kinds of discrimination as well as handicap discrimination. This chapter deals with special questions as to the application of the law to handicap discrimination. Where no special provision is made by the statute, by this chapter, or by exception by the commissioners under WAC 162-06-030, general principles of nondiscrimination apply.

(2) **Statutory rules.** It is an unfair practice under RCW 49.60.222 for any person to do any of the following things because of handicap or the use of a trained dog guide by a blind or deaf person:

"(1) To refuse to engage in a real estate transaction with a person;

"(2) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

"(3) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

"(4) To refuse to negotiate for a real estate transaction with a person;

"(5) To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his attention, or to refuse to permit him to inspect real property;

"(6) To print, circulate, post, or mail, or cause to be so published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;

"(7) To offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith;

"(8) To expel a person from occupancy of real property;

"(9) To discriminate in the course of negotiating, executing, or financing a real estate transaction whether by mortgage, deed of trust, contract, or other instrument imposing a lien or other security in real property, or in negotiating or executing any item or service related thereto including issuance of title insurance, mortgage insurance, loan guarantee, or other aspect of the transaction. . . .

"(10) To attempt to do any of the unfair practices defined in this section."

(3) **Exceptions may be granted.** The commission will grant exceptions to the rules of this chapter under the standards set out in WAC 162-06-030.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-060, filed 9/22/82.]

WAC 162-38-070 Structural barriers to accessibility. (1) **Statute.** RCW 49.60.222 says:

"This section shall not be construed to require structural changes, modifications, or additions to make facilities accessible to a handicapped person except as otherwise required by law."

(2) **Laws requiring accessibility.** The principal laws that require that buildings be made accessible are:

(a) The state building code, chapter 19.27 RCW, which includes the barrier free design standards adopted in chapter 51-10 WAC under authority of chapter 70.92 RCW. The barrier free design standards apply with some exceptions to "buildings, structures, or portions thereof, . . . which are constructed, substantially remodeled, or substantially rehabilitated after October 1, 1976." WAC 51-10-003.

(b) Chapter 219, Laws of 1971 1st ex. sess., in effect from August 9, 1971, through June 30, 1976. This statute required that plans and specifications for the erection or remodeling of any public accommodation must provide for access by physically handicapped persons, for toilet facilities designed for use by the physically handicapped, and for additional facilities specified in a national standard.

(c) Chapter 35, Laws of 1967, in effect from June 8, 1967, through June 30, 1976. This statute was substantially the same as the 1971 statute described in paragraph (b) of this subsection, but was limited in its coverage to public buildings.

(d) RCW 35.68.075, requiring curb ramps in sidewalks constructed or replaced after June 7, 1973.

(e) United States law; particularly 45 CFR § 8423, implementing section 504 of the Rehabilitation Act of 1973 (29 USC § 794), which requires that facilities constructed after April 28, 1977, with federal assistance be readily accessible to and usable by handicapped persons.

(3) **Practices that are not unfair.** It is not an unfair practice under RCW 49.60.222:

(a) To engage in a real estate transaction involving real property with structural barriers that were lawful when constructed and that are presently lawful under the state building code and other law outside of the law against discrimination; or

(b) To maintain real property with structural barriers to accessibility when the structural barriers were lawful when constructed and are presently lawful under the state building code and other law outside of the law against discrimination.

(4) **Unfair practices.** It is an unfair practice under RCW 49.60.222:

(a) To build or remodel in violation of the barrier free design standards, chapter 51-10 WAC, or other requirement of law on accessibility.

(b) To fail to maintain or fail to continue the accessibility of real property that was required by law to be accessible when built, remodeled, or rehabilitated.

(c) To take any action of the types set out in RCW 49.60.222 (1) through (10) against a handicapped person because the real property transaction involves real property that is not accessible.

(d) For an owner of ten or more units of rental property who is making nonstructural changes in the rental property to fail to eliminate barriers to accessibility when this can be done without substantially changing the scope or cost of the project or requiring structural changes that are not otherwise required by law. Specifically, it is an unfair practice:

(i) When installing a nonstructural fixture or component, to choose and install one that is not accessible to the handicapped or that makes the place of public accommodation less accessible to the handicapped.

(ii) When replacing a nonstructural fixture or component, to replace it with one that is not accessible to the handicapped or one that makes the place of public accommodation less accessible to the handicapped.

(iii) When relocating a nonstructural fixture or component, to relocate it to a place that is not accessible to the handicapped, unless no suitable place is accessible.

(iv) When modifying a nonstructural fixture or component, to do so in a way that does not eliminate barriers to the handicapped, when possible.

(5) **What is "structural."** "Structural" for purposes of RCW 49.60.222 means the load bearing members and essential structure or composition of a place, as distinguished from its finish, decorations, or fittings. Examples of structural components are floors, walls, stairs, door openings, sidewalks, elevators, and escalators. Examples of things that are not structural are moveable walls, bathroom fixtures and partitions, fixtures such as water fountains (whether or not attached to a wall), doors and door hardware, cabinets, counters, handrails, signs (attached or painted), elevator controls, alarm systems, and carpeting or other floor covers.

(6) **Modifications by tenant.** Rules with respect to allowing tenants to make structural or other changes in order to achieve or improve accessibility are set out in WAC 162-38-080.

[Statutory Authority: RCW 49.60.120(3). 83-02-012 (Order 43), § 162-38-070, filed 12/23/82.]

WAC 162-38-080 Modifications or additions made by tenants. (1) **Landlord need not pay.** Except as required by law (explained in WAC 162-38-070) a landlord is not required to pay for alterations or additions to real property needed to make it accessible by handicapped persons.

(2) **Unfair to unreasonably prohibit modifications needed by handicapped tenant.** Whether or not the landlord permits tenants in general to make alterations or additions to a structure, it is an unfair practice under RCW 49.60.222 for a landlord to refuse to allow a handicapped tenant to make alterations or additions to the structure or fixtures under the following conditions:

(a) The alterations or additions are paid for by the tenant.

(b) The landlord may reserve the right to approve the design, quality, and construction of the alterations or

additions in order to minimize damage to the building and enforce standards of quality and architectural compatibility.

(3) **Examples of appropriate modifications.** The following are examples of alterations or additions commonly needed to make real property usable by handicapped persons:

(a) Ramps for wheelchairs or walkers.

(b) Lights to indicate to a deaf person that the doorbell or telephone is ringing, or for similar purposes.

(c) Grab bars in bathrooms.

(d) Roll-out shelves in kitchens.

(e) Simplified locking systems for use by a mentally handicapped person.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-080, filed 9/22/82.]

WAC 162-38-090 Public areas of rental property.

(1) **Are covered as places of public accommodation.** RCW 49.60.040 includes the following in its broad definition of place of public accommodation:

". . . public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants."

(2) **Applicable law.** Public areas as defined in this section are governed by the public accommodations coverage of the law against discrimination, RCW 49.60.215, and chapter 162-26 WAC, public accommodations, handicap discrimination, as well as by the real estate transaction coverage of the law against discrimination and this chapter of the commission's regulations.

(3) **Public areas.** "Public" areas for purposes of public accommodations coverage of rental property include all areas intended for use by more than one tenant, or by one or more tenants and the resident owner. The area need not be open to the public at large. The area is covered if it is open to all tenants, or any two tenants, or the owner and one or more tenants. In addition to public halls, public elevators and public washrooms, public areas include garbage disposal facilities, recreation facilities, laundry or other work areas, and open space.

[Statutory Authority: RCW 49.60.120(3). 82-19-086 (Order 41), § 162-38-090, filed 9/22/82.]

WAC 162-38-100 Persons with dog guides. (1) **Are protected.** RCW 49.60.222 protects blind or deaf persons from discrimination because of their use of a trained dog guide the same as it protects them from discrimination directly because of handicap.

(2) **General rule.** The same rules that apply to the treatment of persons because of handicap under RCW 49.60.222 and this chapter apply to the treatment of blind or deaf persons because they use a trained dog guide.

(3) **Landlord's duty.** It is an unfair practice for a landlord to refuse to rent to a blind or deaf person because the person uses a trained dog guide. A landlord's no-pet policy cannot be applied to the dog guide of a blind or deaf person.

(4) **Cleaning or damage deposits not unfair.** It is not an unfair practice for a landlord to enforce on a blind or

deaf tenant its standard cleaning or damage deposit for dogs. It is not an unfair practice for a landlord who otherwise doesn't allow dogs in the rented property to require a reasonable cleaning or damage deposit for the dog when renting to a deaf or blind person using a trained dog guide.

(5) **"Dog guide" defined.** For purposes of RCW 49.60.222 the term "dog guide," means a trained dog guide used by a blind or deaf person. It has the same meaning as "guide dog" in RCW 70.84.020:

"The term 'guide dog' shall mean a dog which is in working harness and is trained or approved by an accredited school engaged in training dogs for the purpose of guiding blind person or a dog which is trained or approved by an accredited school engaged in training dogs for the purpose of assisting hearing impaired persons."

(6) **Identification of trained dog guide.** A trained dog guide used by a blind person is identified by the harness with rigid stirrup for the hand of the guided person that such dogs wear when in service. A trained dog guide used by a deaf person shall be identified by a credential presented by the deaf person on request, or by a tag or other identifying device that is adopted and promulgated so as to become generally known.

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-38-100, filed 9/22/82.]

WAC 162-38-110 Inquiries to handicapped applicants. (1) **Statute.** RCW 49.60.222 includes the following as an unfair practice with respect to handicap:

"(6) To . . . make a . . . inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;"

(2) **Unfair practice.** It is an unfair practice under RCW 49.60.222(6) for a landlord to inquire into matters personal to a handicapped applicant beyond what is necessary and appropriate to the landlord-tenant relationship. For example, the landlord may inquire as to how many persons will occupy the unit, but ordinarily will have no other reason to know whether a handicapped person is assisted by an aide, and when.

(3) **Reference to employment rules.** The commission's rules on pre-employment inquiries, chapter 162-12 WAC, implement a parallel statute and furnish analogies for the application of this portion of the real estate transactions law.

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-38-110, filed 9/22/82.]

WAC 162-38-120 Unfair to request or require waiver of rights. It is an unfair practice for any person as a condition of entering into or continuing a real estate transaction to request or require another person to waive rights or hold anyone harmless because the real property will be occupied by a handicapped person.

[Statutory Authority: RCW 49.60.120(3), 82-19-086 (Order 41), § 162-38-120, filed 9/22/82.]

Chapter 162-40 WAC CREDIT TRANSACTIONS

WAC

- 162-40-010 Scope of chapter.
- 162-40-021 (202.11) Coordination with federal law.
- 162-40-031 (202.1(d)) Commission review of forms, practices and procedures.
- 162-40-041 (202.2) Definitions.
- 162-40-051 (202.4) General rule prohibiting discrimination.

RULES CONCERNING APPLICATIONS

- 162-40-061 (202.5(a)) Discouraging applications.
- 162-40-071 (202.5(b)(1)) General rule concerning request for information.
- 162-40-081 (202.5(b)) Request for designation of membership in certain protected classes.
- 162-40-091 (202.5(d)) Other information a creditor may not request.
- 162-40-101 (202.5(c)) Information about a spouse or former spouse.
- 162-40-111 (202.5(e)) Application forms: Special state requirements.

RULES CONCERNING EVALUATION OF APPLICATIONS

- 162-40-121 (202.6(a)) General rule concerning use of information.
- 162-40-131 (202.6(b)) Specific rules concerning use of information.

RULES CONCERNING EXTENSION OF CREDIT

- 162-40-141 (202.7(a), (b)) Opening accounts.
- 162-40-151 (202.7(c)) Action concerning existing open end accounts.
- 162-40-161 (202.7(d)) Signature of spouse or other person.
- 162-40-171 (202.9) Notifications.
- 162-40-181 (202.10) Furnishing of credit information.

CONSUMER REPORTING AGENCIES

- 162-40-191 General rule.
- 162-40-201 Rules concerning credit files.

GENERAL PROVISIONS

- 162-40-211 (202.12) Record retention.
- 162-40-221 Rules of construction.

EXEMPTIONS

- 162-40-231 (202.8) Exemption for special purpose credit program.
- 162-40-241 (202.3) Special treatment for certain classes of transactions.
- 162-40-251 Remedies.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

- 162-40-020 Coordination with federal law. [Order 25, § 162-40-020, filed 4/23/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-021.
- 162-40-030 General rule. [Order 25, § 162-40-030, filed 4/23/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-051.
- 162-40-040 Definitions. [Order 25, § 162-40-040, filed 4/23/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-041.
- 162-40-050 Discouraging applications. [Order 25, § 162-40-050, filed 4/23/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-061.
- 162-40-060 Separate accounts. [Order 25, § 162-40-060, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-070 Inquiries as to marital status. [Order 24, § 162-40-070, filed 2/20/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-101.
- 162-40-080 Inquiries as to race, creed, color, national origin, or sex. [Order 24, § 162-40-080, filed 2/20/76.] Repealed by Order 34, filed 6/30/77.

- 162-40-090 Designation of title and other sex specific terms. [Order 24, § 162-40-090, filed 2/20/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-100 Designation of name. [Order 24, § 162-40-100, filed 2/20/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-091.
- 162-40-110 Receipt of child support, alimony, or maintenance payment. [Order 24, § 162-40-110, filed 2/20/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-091.
- 162-40-120 Designation of spouse's name. [Order 24, § 162-40-120, filed 2/20/76.] Repealed by Order 34, filed 6/30/77. Later promulgation, see WAC 162-40-101.
- 162-40-130 Designation of previous names of applicant. [Order 24, § 162-40-130, filed 2/20/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-135 Commission review of forms and procedures. [Order 24, § 162-40-135, filed 2/20/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-140 Application of community property law. [Order 25, § 162-40-140, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-150 Information about a spouse or former spouse. [Order 25, § 162-40-150, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-160 Alimony, child support and maintenance obligations. [Order 25, § 162-40-160, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-170 Income from alimony, child support and maintenance. [Order 25, § 162-40-170, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-180 Discounting income. [Order 25, § 162-40-180, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-190 Credit scoring. [Order 25, § 162-40-190, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-200 Telephone listing in applicant's name. [Order 25, § 162-40-200, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-210 Continued ability to repay. [Order 25, § 162-40-210, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-220 Change of name or marital status. [Order 25, § 162-40-220, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-230 Credit history. [Order 25, § 162-40-230, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-240 Use and retention of prohibited information. [Order 25, § 162-40-240, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-250 Notification of action taken and reasons for denial. [Order 25, § 162-40-250, filed 4/23/76; Order 24, § 162-40-250, filed 2/20/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-260 Accounts established on or after 1 June 1977. [Order 29, § 162-40-260, filed 10/29/76; Order 28, § 162-40-260, filed 5/21/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-270 Accounts established prior to 1 June 1977. [Order 29, § 162-40-270, filed 10/29/76; Order 28, § 162-40-270, filed 5/21/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-280 General. [Order 25, § 162-40-280, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-290 Signature of spouse. [Order 25, § 162-40-290, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-300 Secured credit. [Order 25, § 162-40-300, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-310 Prohibited information. [Order 25, § 162-40-310, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-320 Establishing credit files. [Order 25, § 162-40-320, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-330 Name on credit report. [Order 25, § 162-40-330, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-340 Public record information. [Order 28, § 162-40-340, filed 5/21/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-350 Community credit files. [Order 25, § 162-40-350, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-360 Transfer of joint account information. [Order 25, § 162-40-360, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-370 Preservation of records. [Order 25, § 162-40-370, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-380 Exemptions from certain procedural requirements. [Order 25, § 162-40-380, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-390 Effective date. [Order 25, § 162-40-390, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-400 Remedies. [Order 25, § 162-40-400, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.
- 162-40-410 Relation between Regulation B and chapter 162-40 WAC. [Order 25, § 162-40-410, filed 4/23/76.] Repealed by Order 34, filed 6/30/77.

WAC 162-40-010 Scope of chapter. This chapter contains regulations carrying out the purposes of the provisions of the law against discrimination covering credit transactions, and carrying out the policies and practices of the commission in connection therewith. The principal statutes involved are RCW 49.60.175, 49.60-176, and 49.60.222(9).

[Order 25, § 162-40-010, filed 4/23/76.]

WAC 162-40-021 (202.11) Coordination with federal law. (1) Equal Credit Opportunity Act. It is the policy of the commission to coordinate its enforcement of the Washington state law against discrimination with enforcement of the federal Equal Credit Opportunity Act, Pub. L. 93-495, as amended Pub. L. 94-239, 15 USC § 1691 *et seq.*, to the maximum extent possible without diminishing the impact of the state law where the two statutes differ. Most persons will be covered by both statutes. However, the coverage of the federal statute is broader than the state statute. Federal law alters, affects or preempts only those regulations contained in this chapter which are inconsistent with federal law, and then only to the extent of the inconsistency. The regulations contained in this chapter are not inconsistent with federal law if the creditor can comply with such regulations without violating federal law.

(2) Differences between state and federal regulations. The following sections should be closely reviewed, in that these sections contain provisions unique to the state regulation or are different due to the effect of Washington state community property law, chapter 26-16 RCW: WAC 162-40-031; 162-40-041 (5), (7), (12), (18), (20), (21), (22); 162-40-071; 162-40-081; 162-40-101; 162-40-111; 162-40-131 (2)(c), (4)(a), (5)(c), (6); 162-40-161; 162-40-171(5); 162-40-191; 162-40-201; 162-40-231; 162-40-241(2); 162-40-251.

(3) Informal advice. In addition to following the procedures outlined in WAC 162-40-030, persons may seek informal advice from the commission's staff on the differences between the state and federal regulations. Such inquiries should be directed to the commission's credit review officer.

[Order 34, § 162-40-021, filed 6/30/77.]

WAC 162-40-031 (202.1(d)) Commission review of forms, practices and procedures. (1) When requested to do so, the executive secretary or another person designated by the executive secretary to carry out the task

will review forms, procedures or practices of persons subject to this chapter and will respond in writing saying that the form, procedure, or practice is in compliance with this chapter and the law against discrimination, or identifying in what respect the form, procedure, or practice is not in compliance.

(2) Requests for review of forms, procedures, or practices should be in writing, preferably in the form of a letter, and shall have attached a complete copy of the form or a precise statement of the procedure or practice to be reviewed.

(3) Requests for review of forms, procedures, or practices may be addressed to the credit review officer at the Seattle office of the commission.

(4) Commission responses can be withdrawn, revised, or modified at any time: *Provided*, That such withdrawal, revision, or modification shall not be deemed effective until the commission shall have given notice of the withdrawal, revision, or modification to the person who requested the commission response. Responses will be made in terms of compliance with statutes, regulations, commission rulings, and case law at the time of the writing. Responses shall be deemed to be superceded to the extent of any material change in the statutes, regulations, or case law.

(5) When a person has relied in good faith on a commission response under this section, the commission will not thereafter assert against that person a contrary position on compliance of that form, procedure or practice with the law and this chapter until such time as the response is withdrawn, revised, or modified, unless the statutes, regulations, or case law have changed in a material respect. The commission's response shall have no effect on charges of unfair practices involving conduct other than use of the reviewed form, procedure, or practice except that the content of the response or the fact that it was requested is material to prove or disprove some issue concerning those charges.

(6) In addition to the provisions of this section, a creditor may request a declaratory ruling, pursuant to WAC 162-08-620.

[Order 34, § 162-40-031, filed 6/30/77.]

WAC 162-40-041 (202.2) Definitions. For purposes of this regulation, unless the context indicates otherwise, the following definitions and rules of construction shall apply:

(1) "Account" means an extension of credit. When employed in relation to an account, the word "use" refers only to open end credit.

(2) "Adverse action."

(a) For the purposes of notification of action taken, statement of reasons for denial, and record retention, the term means:

(i) A refusal to grant credit in substantially the amount on substantially the terms requested by an applicant unless the creditor offers to grant credit other than in substantially the amount or on substantially the terms requested by the applicant and the applicant uses or expressly accepts the credit offered; or

(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or a substantial portion of a classification of a creditor's accounts; or

(iii) A refusal to increase the amount of credit available to an applicant when the applicant requests an increase in accordance with procedures established by the creditor for the type of credit involved.

(b) The term does not include:

(i) A change in the terms of an account expressly agreed to by an applicant; or

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account; or

(iii) A refusal to extend credit at a point of sale or loan in connection with the use of an account because the credit requested would exceed a previously established credit limit on the account; or

(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.

(3) "Applicant" means any person who requests or who received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party.

(4) "Application" means an oral or written request for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested. The term does not include the use of an account or line of credit to obtain an amount of credit that does not exceed a previously established credit limit. A "completed application for credit" means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral); provided, however, that the creditor has exercised reasonable diligence in obtaining such information. Where an application is incomplete respecting matters that the applicant can complete, a creditor shall make a reasonable effort to notify the applicant of the incompleteness and shall allow the applicant a reasonable opportunity to complete the application.

(5) "Community property" means community property under the law of the state of Washington. RCW 26.16.030.¹ See companion definition of separate property, *infra*.

(6) "Consumer credit" means credit extended to a natural person in which the money, property or service that is the subject of the transaction is primarily for personal, family, or household purposes.

(7) "Consumer reporting agency" means any person which for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the

practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing reports on consumers to third parties. For purposes of this regulation this definition shall not include creditors who report only their own transactions or experiences between the consumer and the person making the report.

(8) "Contractually liable" means expressly obligated to repay all debts arising on an account by reason of an agreement to that effect.

(9) "Credit" means the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.

(10) "Credit card" means any card, plate, coupon book, or other single credit device existing for the purpose of being used from time to time upon presentation to obtain money, property, or services on credit.

(11) "Creditor" means a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes an assignee, transferee, or subrogee of an original creditor who so participates; but an assignee, transferee, subrogee, or other creditor is not a creditor regarding any violation of chapter 49.60 RCW or this chapter committed by the original or another creditor unless the assignee, transferee, subrogee, or other creditor knew or had reasonable notice of the act, policy, or practice that constituted the violation before its involvement with the credit transaction. The term does not include a person whose only participation in a credit transaction is to honor a credit card.

(12) "Credit transaction" is defined in RCW 49.60.040.² Consistent with Regulation B, "credit transaction" may also mean every aspect of an applicant's dealings with a creditor regarding an application for, or an existing extension of, credit including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures.

(13) "Extend credit and extension of credit" mean the granting of credit in any form and include, but are not limited to, credit granted in addition to any existing credit or credit limit; credit granted pursuant to an open end credit plan; the refinancing or other renewal of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card; the consolidation of two or more obligations; or the continuance of existing credit without any special effort to collect at or after maturity.

(14) "Good faith" means honesty in fact in the conduct or transaction.

(15) "Inadvertent error" means a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(16) "Marital status" means the state of being unmarried, married, or separated, as defined by applicable state law. For the purposes of this regulation, the term

"unmarried" includes persons who are single, divorced, or widowed.

(17) "Open end credit" means credit extended pursuant to a plan under which a creditor may permit an applicant to make purchases or obtain loans from time to time directly from the creditor or indirectly by use of a credit card, check, or other device as the plan may provide. The term does not include negotiated advances under an open end real estate mortgage or letter of credit.

(18) "Person" is defined in RCW 49.60.040.³ Consistent with Regulation B, "person" may also mean a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(19) "Prohibited basis" means race, color, creed, national origin, sex and marital status.

(20) "Separate property" is defined in RCW 26.16.010 and 26.16.020.⁴

Notes:

¹RCW 26.16.030. Community property defined—Management and control. Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

(1) Neither spouse shall devise or bequeath by will more than one-half of the community property.

(2) Neither spouse shall give community property without the express or implied consent of the other.

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

(4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.

(5) Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement or bill of sale, if any.

(6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: *Provided*, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse. (1972 ex.s. c 108 § 3; Code 1881 § 2409; RRS § 6892.)

²RCW 49.60.040: "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the course of the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

³RCW 49.60.040: "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers or any group of persons; it includes any owner, lessee, proprietor, manager, agent or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

⁴RCW 26.16.010. Separate property of husband. Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will such property without the wife joining in such management, alienation or encumbrance, as fully and to the same effect as though he were unmarried.

RCW 26.16.020 Separate property of wife. The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property to the same extent and in the same manner that her husband can, property belonging to him.

[Order 34, § 162-40-041, filed 6/30/77.]

WAC 162-40-051 (202.4) General rule prohibiting discrimination. A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

[Order 34, § 162-40-051, filed 6/30/77.]

RULES CONCERNING APPLICATIONS

WAC 162-40-061 (202.5(a)) Discouraging applications. A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.

[Order 34, § 162-40-061, filed 6/30/77.]

WAC 162-40-071 (202.5(b)(1)) General rule concerning requests for information. Except as otherwise provided in this chapter, a creditor may request any information in connection with an application unless such information is used to discriminate against an applicant or a prospective applicant on a prohibited basis.

[Order 34, § 162-40-071, filed 6/30/77.]

WAC 162-40-081 (202.5(b)) Request for designation of membership in certain protected classes. Except as otherwise provided in this chapter, a creditor shall not inquire about the race, creed, color, national origin or sex of an applicant in connection with any aspect of a credit transaction. Some exceptions are:

(1) A creditor may obtain such information as may be required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency to monitor or enforce compliance with this statute, or other federal and state statute or regulation.

(2) The Executive Secretary (or his/her designate) may authorize specific creditors to obtain and/or retain information concerning membership in protected classes for purposes which will aid in carrying forth the law against discrimination.

(3) A creditor may inquire as to an applicant's permanent residence or whether the applicant is a permanent resident of the United States. If the creditor determines that the applicant is not a permanent resident of the United States, the creditor may then inquire as to the applicant's immigration status and additional

information, as may be necessary to ascertain its rights and remedies regarding repayment.

[Order 34, § 162-40-081, filed 6/30/77.]

WAC 162-40-091 (202.5(d)) Other information a creditor may not request. (1) A creditor shall not inquire whether any income stated in an application is derived from alimony, child support, or separate maintenance payments, unless the creditor appropriately discloses to the applicant that such income need not be revealed if the applicant does not desire the creditor to consider such income in determining the applicant's creditworthiness. Since a general inquiry about income, without further specification, may lead an applicant to list alimony, child support, or separate maintenance payments, a creditor shall provide an appropriate notice to an applicant before inquiring about the source of an applicant's income, unless the terms of the inquiry (such as an inquiry about salary, wages, investment income, or similarly specified income) tend to preclude the unintentional disclosure of alimony, child support, or separate maintenance payments.

(2) A creditor shall not request information about birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children. This does not preclude a creditor from inquiring about the number and ages of an applicants' dependents or about dependent related financial obligations or expenditures, provided such information is requested without regard to sex, marital status, or any other prohibited basis.

(3) An application form shall use only terms that are neutral as to sex. An applicant may be requested to designate a title on an application form (such as Ms., Miss, Mr., or Mrs.) if the form appropriately discloses that the designation of such a title is optional.

(4) A creditor shall not request an applicant's marital status other than by use of the terms "married," "unmarried," and "separated." A creditor may explain that the category "unmarried" includes single, divorced and widowed persons.

[Order 34, § 162-40-091, filed 6/30/77.]

WAC 162-40-101 (202.5(c)) Information about a spouse or former spouse. (1) Subject to subsection (2) below, a creditor may request any information concerning an applicant's spouse (or former spouse under (e) below) that may be requested about the applicant if:

(a) The spouse will be permitted to use the account; or

(b) The spouse will be contractually liable upon the account; or

(c) The applicant is relying upon the spouse's income as a basis for repayment of the credit requested; or

(d) The applicant resides in Washington or another community property state or property upon which the applicant is relying as a basis for repayment of the credit requested is located in such a state; or

(e) The applicant is relying on alimony, child support, or separate maintenance payments from a spouse or

former spouse as a basis for repayment of the credit requested.

(2) A creditor may assume that a married applicant who resides in a community property state is incurring a community obligation and will be relying upon community property for repayment: *Provided*, If an applicant demonstrates that he/she is relying solely on the applicant's separate property as a basis for repayment of the credit requested, a creditor may not request information about such applicant's spouse or former spouse except in accordance with subsection 1(a), 1(b) or 1(e) above.

(3) A creditor may request an applicant to list any account upon which the applicant is liable and to provide the name and address in which such account is carried. A creditor may also ask the names in which an applicant has previously received credit.

[Order 34, § 162-40-101, filed 6/30/77.]

WAC 162-40-111 (202.5(e)) Application forms: Special state requirements. A creditor need not use written application forms. If a creditor chooses to use a written form, it must comply with the provisions of 12 C.F.R. § 202.5(e), and

(1) If the form inquires about the name of the applicant's spouse, the form shall provide space for the first and last names of the spouse;

(2) If the form inquires about an applicant's credit references, the form shall also inquire if the applicant's credit references and/or credit history may be verified in any other name(s).

(3) If the form inquires about an applicant's income, it shall provide space in which the applicant may list income derived from child support, alimony or separate maintenance payments.

[Order 34, § 162-40-111, filed 6/30/77.]

RULES CONCERNING EVALUATION OF APPLICATIONS

WAC 162-40-121 (202.6(a)) General rule concerning use of information. Except as otherwise provided in this chapter, a creditor may consider in evaluating an application any information that the creditor obtains, so long as the information is not used to discriminate against an applicant on a prohibited bases.

[Order 34, § 162-40-121, filed 6/30/77.]

WAC 162-40-131 (202.6(b)) Specific rules concerning use of information. (1) Except as provided in this chapter, a creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants.

(2) A creditor shall not use, in evaluating the creditworthiness of an applicant, assumptions or aggregate statistics relating to the likelihood that any group of persons will bear or rear children or, for that reason, will receive diminished or interrupted income in the future.

(3) A creditor shall not take into account the existence of a telephone listing in the name of an applicant for consumer credit. A creditor may take into account

the existence of a telephone in the residence of such an applicant.

(4) A creditor shall not discount or exclude from consideration the income of an applicant or the spouse of the applicant because of a prohibited basis or because the income is derived from part time employment, but a creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness. Where an applicant relies on alimony, child support, or separate maintenance payments in applying for credit, a creditor shall consider such payments as income to the extent that they are likely to be consistently made. Factors that a creditor may consider in determining the likelihood of consistent payments include, but are not limited to, whether the payments are received pursuant to a written agreement or court decree; the length of time that the payments have been received; the regularity of receipt, the availability of procedures to compel payment; and the creditworthiness of the payor, including the credit history of the payor where available under the Fair Credit Reporting Act or other applicable laws.

(a) None of the factors permitted to be considered by a creditor by this subsection in determining the likelihood of consistent alimony, child support or maintenance payments shall be used by a creditor as a subterfuge for routinely erecting unreasonable or insurmountable barriers to applicants relying on such payments to establish creditworthiness.

(5) To the extent that a creditor considers credit history in evaluating the creditworthiness of similarly qualified applicants for a similar type and amount of credit, in evaluating an applicant's creditworthiness, a creditor shall consider (unless the failure to consider results from inadvertent error):

(a) The creditor history, when available, of accounts designated as accounts that the applicant and a spouse are permitted to use or for which both are contractually liable;

(b) On the applicant's request, any information that the applicant may present tending to indicate that the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness; and

(c) On the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse for which the applicant was obligated by operation of the community property law or which an applicant can demonstrate reflects accurately the applicant's willingness or ability to repay.

(6) A creditor may consider whether an applicant is a permanent resident of the United States. If the applicant is not a permanent resident, the creditor may consider the applicant's immigration status and additional information, as such may be necessary to ascertain its rights and remedies regarding repayment.

[Order 34, § 162-40-131, filed 6/30/77.]

RULES CONCERNING EXTENSION OF CREDIT**WAC 162-40-141 (202.7(a), (b)) Opening accounts.**

(1) Individual accounts. A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.

(2) Name on account. A creditor shall not prohibit an applicant from opening or maintaining an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname.

[Order 34, § 162-40-141, filed 6/30/77.]

WAC 162-40-151 (202.7(c)) Action concerning existing open end accounts. (1) In the absence of evidence of inability or unwillingness to repay, a creditor shall not take any of the following actions regarding an applicant who is contractually liable on an existing open end account on the basis of a change in the applicant's name or marital status:

- (i) Require a reapplication; or
- (ii) Change the terms of the account; or
- (iii) Terminate the account.

(2) A creditor may require a reapplication regarding an open end account on the basis of a change in an applicant's marital status where the credit granted was based on income earned by the applicant's spouse if the applicant's income alone at the time of the original application would not support the amount of credit currently extended.

[Order 34, § 162-40-151, filed 6/30/77.]

WAC 162-40-161 (202.7(d)) Signature of spouse or other person. (1) Except as provided in this section, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

(2) If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness, a creditor may consider state law; the form of ownership of the property, its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. If necessary to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property relied upon available to satisfy the debt in the event of default.

(3) If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, any instrument to create a valid

lien, pass clear title, waive inchoate rights, or assign earnings.

(4) If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request that the applicant obtain a co-signer, guarantor, or the like. The applicant's spouse may serve as an additional party, but a creditor shall not require that the spouse be the additional party. For the purposes of this section, a creditor shall not impose requirements upon an additional party that the creditor may not impose upon an applicant.

[Order 34, § 162-40-161, filed 6/30/77.]

WAC 162-40-171 (202.9) Notifications. (1) Notification of action taken. A creditor shall notify an applicant of action taken within:

(a) 30 days after receiving a completed application concerning the creditor's approval of, or adverse action regarding, the application (notification of approval may be express or by implication, where, for example, the applicant receives a credit card, money, property, or services in accordance with the application);

(b) 30 days after taking adverse action on an uncompleted application;

(c) 30 days after taking adverse action regarding an existing account; and

(d) 90 days after the creditor has notified the applicant of an offer to grant credit other than in substantially the amount or on substantially the terms requested by the applicant if the applicant during those 90 days has not expressly accepted or used the credit card.

(2) Content of notification. Any notification given to an applicant against whom adverse action is taken shall be in writing and shall contain: A statement of the action taken; a statement that the Washington state human rights commission administers compliance with the Washington state law against discrimination; and

(a) A statement of specific reasons for the action taken; or

(b) A disclosure of the applicant's right to a statement of reasons within 30 days after receipt by the creditor of a request made within 60 days of such notification, the disclosure to include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained. If the creditor chooses to provide the statement of reasons orally, the notification shall also include a disclosure of the applicant's right to have any oral statement of reasons confirmed in writing within 30 days after a written request for confirmation is received by the creditor.

(3) Multiple applicants. If there is more than one applicant, the notification need only be given to one of them, but must be given to the primary applicant where one is readily apparent.

(4) Multiple creditors. If a transaction involves more than one creditor and the applicant expressly accepts or uses the credit offered, this section does not require notification of adverse action by any creditor. If a transaction involves more than one creditor and either no credit is offered or the applicant does not expressly accept or

use any credit offered, then each creditor taking adverse action must comply with this section. The required notification may be provided indirectly through a third party which may be one of the creditors, provided that the identity of each creditor taking adverse action is disclosed. Whenever the notification is to be provided through a third party, a creditor shall not be liable for any act or omission of the third party that constitutes a violation of this section if the creditor accurately and in a timely manner provided the third party with the information necessary for the notification and was maintaining procedures reasonably adapted to avoid any such violation.

(5) Form of notice and statement of specific reasons.

(a) A creditor satisfies the requirements of subsection (2) above if it provides the following notice or one substantially similar:

"Washington state law against discrimination prohibits discrimination in credit transactions because of race, creed, color, national origin, sex or marital status. The Washington state human rights commission administers compliance with this law."

The above notice may be combined with or follow the notice required by 12 C.F.R. § 202.9.

(b) Statement of specific reasons. A statement of reasons for adverse action shall be sufficient if it is specific and indicates the principal reason(s) for the adverse action. A creditor may formulate its own statement of reasons in checklist or letter form or may use all or a portion of the sample form printed below, which, if properly completed, satisfies the requirements of subsection (2)(a). Statements that the adverse action was based on the creditor's internal standards or policies or that the applicant failed to achieve the qualifying score on the creditor's credit scoring system are insufficient.

STATEMENT OF CREDIT DENIAL, TERMINATION, OR CHANGE

Date -----

Applicant's name: -----

Applicant's address: -----

Description of account, transaction, or requested credit: -----

Description of adverse action taken: -----

PRINCIPAL REASON(S) FOR ADVERSE ACTION CONCERNING CREDIT

- Credit application incomplete
- Insufficient credit references
- Unable to verify credit references
- Temporary or irregular employment
- Unable to verify employment
- Length of employment
- Insufficient income
- Excessive obligations
- Unable to verify income
- Inadequate collateral
- Too short a period of residence
- Temporary residence
- Unable to verify residence
- No credit file

- Insufficient credit file
- Delinquent credit obligations
- Garnishment, attachment, foreclosure, repossession, or suit
- Bankruptcy
- We do not grant credit to any applicant on the terms and conditions you request.
- Other, specify: -----

DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE

- Disclosure inapplicable
- Information obtained in a report from a consumer reporting agency.
Name: -----
Street address: -----
Telephone number: -----
- Information obtained from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, within 60 days of receipt of this notice, for disclosure of the nature of the adverse information.
Creditor's name: -----
Creditor's address: -----
Creditor's telephone number: -----

(6) Other information. The notification required by subsection (1) may include other information so long as it does not detract from the required content. This notification may also be combined with any disclosures required under any other law, provided that all requirements for clarity and placement are satisfied; and it may appear on either or both sides of the paper if there is a clear reference on the front to any information on the back.

(7) Oral notifications. The applicable requirements of this section are satisfied by oral notifications (including statements of specific reasons) in the case of any creditor that did not receive more than 150 applications during the calendar year immediately preceding the calendar year in which the notification of adverse action is to be given to a particular applicant.

(8) Withdrawn applications. Where an applicant submits an application and the parties contemplate that the applicant will inquire about its status, if the creditor approves the application and the applicant has not inquired within 30 days after applying, then the creditor may treat the application as withdrawn and need not comply with subsection (1).

(9) Failure of compliance. A failure to comply with this section shall not constitute a violation when caused by an inadvertent error; provided that, on discovering the error, the creditor corrects it as soon as possible and commences compliance with the requirements of this section.

(10) Notification. A creditor notifies an applicant when a writing addressed to the applicant is delivered or mailed to the applicant's last known address or, in the case of an oral notification, when the creditor communicates with the applicant.

[Order 34, § 162-40-171, filed 6/30/77.]

WAC 162-40-181 (202.10) Furnishing of credit information. (1) Accounts established on or after June 1, 1977.

(a) For every account established on or after June 1, 1977, a creditor that furnishes credit information shall:

(i) Determine whether an account offered by the creditor is one that an applicant's spouse is permitted to use or upon which the spouses are contractually liable other than as guarantors, sureties, endorsers, or similar parties; and

(ii) Designate any such account to reflect the fact of participation of both spouses.

(b) Except as provided in subsection (3), if a creditor furnishes credit information concerning an account designated under this section (or designated prior to the effective date of this regulation) to a consumer reporting agency, it shall furnish the information in a manner that will enable the agency to provide access to the information in the name of each spouse.

(c) If a creditor furnishes credit information concerning an account designated under this section (or designated, prior to the effective date of this regulation) in response to an inquiry regarding a particular applicant, it shall furnish the information in the name of the spouse about whom such information is requested.

(2) Accounts established prior to June 1, 1977. For every account established prior to and in existence on June 1, 1977, a creditor that furnishes credit information shall either:

(a) Not later than June 1, 1977

(i) Determine whether the account is one that an applicant's spouse, if any, is permitted to use or upon which the spouses are contractually liable other than as guarantors, sureties, endorsers, or similar parties;

(ii) Designate any such account to reflect the fact of participation of both spouses; and

(iii) Comply with the reporting requirements of subsections (1)(b) and (1)(c); or

(b) Mail or deliver to all account holders or all married account holders in whose name the account is carried the notice required by 12 C.F.R. § 202.10(b)(2).

(3) Requests to change manner in which information is reported. Within 90 days after receipt of a properly completed request to change the manner in which information is reported to consumer reporting agencies and others regarding an account described in subsection (2), a creditor shall designate the account to reflect the fact of participation of both spouses. When furnishing information concerning any such account, the creditor shall comply with the reporting requirements of subsection (1)(b) and (1)(c). The signature of an applicant or the applicant's spouse on a request to change the manner in which information concerning an account is furnished shall not alter the legal liability of either spouse upon the account or require the creditor to change the name in which the account is carried.

(4) Inadvertent errors. A failure to comply with this section shall not constitute a violation when caused by an inadvertent error; provided that, on discovering the

error, the creditor corrects it as soon as possible and commences compliance with the requirements of this section.

[Order 34, § 162-40-181, filed 6/30/77.]

CONSUMER REPORTING AGENCIES

WAC 162-40-191 General rule. A consumer reporting agency shall not report to a creditor any information relating to an applicant's race, creed, color, national origin or sex.

[Order 34, § 162-40-191, filed 6/30/77.]

WAC 162-40-201 Rules concerning credit files. (1) Establishing credit files. A consumer reporting agency shall not refuse to establish a credit file for any person in any name under which an applicant may open or maintain an account pursuant to WAC 162-40-140. This file may be referenced with the file of the applicant's spouse.

(2) Name on credit report. A consumer reporting agency shall issue credit reports in the name in which the request for the report was received. A credit report may include the name of the spouse or former spouse, if available.

(3) Public record information. If a consumer reporting agency places public record information in credit files and such information contains the names of both spouses, such information shall be referenced so that it is accessible in the name of each spouse.

(a) If a consumer reporting agency places public record information concerning a decree of separation or dissolution of marriage in credit files, it shall place such information in the individual credit file of each spouse.

(4) Community credit files. A consumer reporting agency may reference the credit files of married persons by listing in a spouse's file that the information is contained in the other spouse's file, provided the information is accessible by use of each spouse's name.

(5) Transfer of joint account information. A consumer reporting agency shall, upon request, transfer information from joint credit files to an individual credit file regardless of the name in which the information was originally reported.

[Order 34, § 162-40-201, filed 6/30/77.]

GENERAL PROVISIONS

WAC 162-40-211 (202.12) Record retention. (1) Retention of prohibited information. Retention in a creditor's files of any information, the use of which is prohibited by these regulations, shall not constitute a violation of these regulations where such information was obtained:

(a) From any source prior to June 1, 1976;

(b) At any time from consumer reporting agencies, and;

(c) At any time from an applicant or others without the specific request of the creditor; or

(d) At any time as required to monitor compliance with this statute, or other federal or state statute or regulation.

(2) Preservation of records.

(a) For 25 months after the date that a creditor notifies an applicant of action taken on an application, the creditor shall retain as to that application in original form or a copy thereof:

(i) Any application form that it receives, any information required to be obtained concerning characteristics of an applicant to monitor compliance with any other written or recorded information used in evaluating the application and not returned to the applicant at the applicant's request;

(ii) A copy of the following documents if furnished to the applicant in written form (or, if furnished orally, any notation or memorandum with respect thereto made by the creditor):

(A) The notification of action taken; and

(B) The statement of specific reasons for adverse action; and

(iii) Any written statement submitted by the applicant alleging a violation of this regulation.

(b) For 25 months after the date that a creditor notifies an applicant of adverse action regarding an account, other than in connection with an application, the creditor shall retain as to that account, in original form or a copy thereof:

(i) Any written or recorded information concerning such adverse action; and

(ii) Any written statement submitted by the applicant alleging a violation of this regulation.

(c) In addition to the requirements of subsections (a) and (b), any creditor that has actual notice that a complaint has been filed against it under chapter 49.60 RCW and these regulations shall retain the information required in subsections (a) and (b) until notified of final disposition of the matter by the Washington State human rights commission.

(d) In any transaction involving more than one creditor, any creditor not required to comply with WAC 162-40-180 (notifications) shall retain for the time period specified in subsection (2) all written or recorded information in its possession concerning the applicant, including a notation of action taken in connection with any adverse action.

(3) Failure of compliance. A failure to comply with this section shall not constitute a violation when caused by an inadvertent error.

[Order 34, § 162-40-210 (codified as WAC 162-40-211), filed 6/30/77.]

WAC 162-40-221 Rules of construction. (1) Any violation of the provisions of this chapter shall constitute an unfair practice within the meaning of RCW 49.60-.175, 49.60.176, and/or 49.60.222(9).

(2) Captions, catchlines and parenthetical references to Regulation B, 12 C.F.R. pt. 202 are intended solely as aids to convenient reference, and no inference as to the substance of any provision of these regulations may be drawn from them.

[Order 34, § 162-40-221, filed 6/30/77.]

EXEMPTIONS

WAC 162-40-231 (202.8) Exemption for special purpose credit program. Any credit program that qualifies as a special purpose credit program under the provisions of 12 C.F.R. § 202.8 is exempt from the operation of these regulations to the extent these regulations are inconsistent with the provisions of 12 C.F.R. § 202.8.

[Order 34, § 162-40-231, filed 6/30/77.]

WAC 162-40-241 (202.3) Special treatment for certain classes of transactions. (1) Classes of transactions afforded special treatment. The following classes of transactions are afforded specialized treatment:

(a) Extensions of credit relating to transactions under public utility tariffs involving services provided through pipe, wire, or other connected facilities if the charges for such public utility services, the charges for delayed payment, and any discount allowed for early payment are filed, with, or reviewed or regulated by, an agency of the federal government, a state, or a political subdivision thereof;

(b) Extensions of credit subject to regulation under section 7 of the Securities and Exchange Act of 1934 or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities and Exchange Act of 1934;

(c) Extensions of incidental consumer credit, other than the types described in subsections (a) and (b):

(i) That are not made pursuant to the terms of a credit card account;

(ii) On which no finance charge as defined in 12 C.F.R. § 226.4 (Regulation Z) is or may be imposed; and

(iii) that are not payable by agreement in more than four installments;

(d) Extensions of credit primarily for business or commercial purposes, including extensions of credit primarily for agricultural purposes, but excluding extensions of credit of the types described in subsections (a) and (b); and

(e) Extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities.

(2) Public utilities credit. The following provisions of these regulations shall not apply to extensions of credit of the type described in subsection (1)(a):

(a) WAC 162-40-181 relating to furnishing of credit information; and

(b) WAC 162-40-211 relating to record retention.

(3) Securities credit. The following provisions of these regulations shall not apply to extensions of credit of the type described in subsection (1)(b):

(a) WAC 162-40-101 concerning information about a spouse or former spouse;

(b) WAC 162-40-091(4) concerning information about marital status;

(c) WAC 162-40-081 concerning information about the sex of an applicant;

(d) WAC 162-40-141(2) relating to designation of name, but only to the extent necessary to prevent violation of rules regarding an account in which a broker or dealer has an interest, or rules necessitating the aggregation of accounts of spouses for the purpose of determining controlling interests, beneficial interests, beneficial ownership, or purchase limitations and restrictions;

(3) WAC 162-40-151 relating to action concerning open end accounts;

(f) WAC 162-40-161 relating to signatures of spouse or other person;

(g) WAC 162-40-181 relating to furnishing of credit information; and

(h) WAC 162-40-211 relating to record retention.

(4) Incidental credit. The following provisions of these regulations shall not apply to extensions of credit of the type described in subsection (1)(c):

(a) WAC 162-40-101 concerning information about a spouse or former spouse;

(b) WAC 162-40-091(4) concerning information about marital status;

(c) WAC 162-40-091(1) concerning information about income derived from alimony, child support, separate maintenance payments;

(d) WAC 162-40-081 concerning information about the sex of an applicant to the extent necessary for medical records or similar purposes;

(e) WAC 162-40-161 relating to signatures of spouse or other person;

(f) WAC 162-40-171 relating to notifications;

(g) WAC 162-40-181 relating to furnishing of credit information; and

(h) WAC 162-40-211 relating to record retention.

(5) Business credit. The following provisions of these regulations shall not apply to extensions of credit of the type described in subsection (1)(d):

(a) WAC 162-40-091(4) concerning information about marital status;

(b) WAC 162-40-171 relating to notifications, unless an applicant, within 30 days after oral or written notification that adverse action has been taken, requests in writing the reasons for such action;

(c) WAC 162-40-181 relating to furnishing of credit information;

(d) WAC 162-40-211 relating to record retention, unless an applicant, within 90 days after adverse action has been taken, requests in writing that the records relating to the application be retained.

(6) Governmental credit. Except for WAC 162-40-010 relating to the authority and scope, WAC 162-40-041 relating to definitions, WAC 162-40-051 relating to the general rule prohibiting discrimination, WAC 162-40-071 relating to the general rule concerning requests for information, WAC 162-40-121 relating to the general rule concerning use of information, and WAC 162-40-211(1) relating to the retention of prohibited information, the provisions of these regulations shall not apply to extensions of credit of the type described in subsection (1)(e).

[Order 34, § 162-40-241, filed 6/30/77.]

WAC 162-40-251 Remedies. A hearing tribunal may order, or the commission's staff may propose upon a finding of reasonable cause to believe a violation of chapter 49.60 RCW has occurred, or in prefinding settlement efforts, remedies, including but not limited to:

(1) Requiring the creditor to establish in writing non-discriminatory criteria for the granting of credit.

(2) Requiring the creditor or consumer reporting agency to conduct training sessions of its employees and agents in order to insure that discriminatory practices cease.

(3) Requiring the creditor to pay actual or special damages to aggrieved parties.

(4) Requiring the creditor to submit to the commission proof that it has ceased said discriminatory practices and implemented a policy of nondiscrimination.

(5) Requiring that the creditor conduct remedial advertising.

(6) Requiring the creditor to offer credit to the aggrieved parties.

(7) Requiring the creditor or consumer reporting agency to revise the structure and content of its files to eliminate discrimination and to remove all references to the complaint from the complainant's file.

(8) Requiring the posting of a notice in view of applicants for credit stating that it is an unfair practice for any person furnishing credit to deny or terminate such credit or to adversely affect an individual's credit standing because of such individual's race, creed, color, sex, national origin, or marital status.

(9) Requiring the distribution of these regulations to each of its employees and agents who determine, influence, or effectuate the creditor's policies and practices.

[Order 34, § 162-40-251, filed 6/30/77.]