

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 140

(Senators Snyder, Romano and Facemire, *original sponsors*)

[Passed March 13, 2015; in effect from passage.]

AN ACT to repeal §29A-2-8 of the Code of West Virginia, 1931, as amended; to amend and reenact §29A-1-2 of said code; to amend said code by adding thereto two new sections, designated §29A-1-3a and §29A-1-3b; and to amend and reenact §29A-3-1a, §29A-3-4, §29A-3-8, §29A-3-13 and §29A-3-15 of said code, all relating generally to the State Administrative Procedures Act; defining “legislative exempt rule”; providing certain technical amendments; providing for nullification and voiding of rules; setting forth requirements for amendments to existing rules, proposed new rules and repeal of existing rules; establishing filing and adoption requirements for legislative exempt rules; making legislative rules effective upon filing; requiring agency to provide list of interested parties with emergency rules; and changing number of copies required when filing an emergency rule.

Be it enacted by the Legislature of West Virginia:

That §29A-2-8 of the Code of West Virginia, 1931, as amended, be repealed; that §29A-1-2 of said code be amended and reenacted; that said code be amended by adding thereto two new

sections, designated §29A-1-3a and §29a-1-3b; and that §29A-3-1a, §29A-3-4, §29A-3-8, §29A-3-13 and §29A-3-15 of said code be amended and reenacted, all to read as follows:

ARTICLE 1. DEFINITIONS AND APPLICATION OF CHAPTER.

§29A-1-2. Definitions of terms used in this chapter.

1 For the purposes of this chapter:

2 (a) "Agency" means any state board, commission, department, office or officer authorized
3 by law to make rules or adjudicate contested cases, except those in the legislative or judicial
4 branches.

5 (b) "Contested case" means a proceeding before an agency in which the legal rights, duties,
6 interests or privileges of specific parties are required by law or constitutional right to be determined
7 after an agency hearing, but does not include cases in which an agency issues a license, permit or
8 certificate after an examination to test the knowledge or ability of the applicant where the
9 controversy concerns whether the examination was fair or whether the applicant passed the
10 examination and does not include rulemaking.

11 (c) "Interpretive rule" means every rule, as defined in subdivision (j) of this section, adopted
12 by an agency independently of any delegation of legislative power which is intended by the agency
13 to provide information or guidance to the public regarding the agency's interpretations, policy or
14 opinions upon the law enforced or administered by it and which is not intended by the agency to be
15 determinative of any issue affecting constitutional, statutory or common law rights, privileges or
16 interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to
17 regulate conduct or the exercise of constitutional, statutory or common law rights or privileges nor
18 to confer any right or privilege provided by law and is not admissible in any administrative or
19 judicial proceeding for that purpose, except where the interpretive rule established the conditions for

1 the exercise of discretionary power as provided in this subdivision. However, an interpretive rule is
2 admissible for the purpose of showing that the prior conduct of a person was based on good faith
3 reliance on the rule. The admission of the rule in no way affects any legislative or judicial
4 determination regarding the prospective effect of the rule. Where any provision of this code lawfully
5 commits any decision or determination of fact or judgment to the sole discretion of any agency or
6 any executive officer or employee, the conditions for the exercise of that discretion, to the extent that
7 the conditions are not prescribed by statute or by legislative rule, may be established by an
8 interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove the
9 conditions.

10 (d) "Legislative exempt rule" means every rule promulgated by an agency or relating to a
11 subject matter that is exempt from the rule-making provisions of article three of this chapter, under
12 section three, article one of this chapter or any other section of this code.

13 (e) "Legislative rule" means every rule, as defined in subdivision (j) of this section, proposed
14 or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which,
15 when promulgated after or pursuant to authorization of the Legislature, has: (1) The force of law;
16 or (2) supplies a basis for the imposition of civil or criminal liability; or (3) grants or denies a
17 specific benefit. Every rule which, when effective, is determinative on any issue affecting
18 constitutional, statutory or common law rights, privileges or interests is a legislative rule. Unless
19 lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and
20 has no legal force or effect until promulgated by specific authorization of the Legislature. Except
21 where otherwise specifically provided in this code, legislative rule does not include: (A) Findings
22 or determinations of fact made or reported by an agency, including any findings and determinations
23 that are required to be made by any agency as a condition precedent to proposal of a rule to the

1 Legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one,
2 article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive
3 orders or proclamations by the Governor issued solely in the exercise of executive power, including
4 executive orders issued in the event of a public disaster or emergency.

5 (f) "Order" means the whole or any part of the final disposition, whether affirmative,
6 negative, injunctive or declaratory in form, by any agency of any matter other than rulemaking.

7 (g) "Person" includes individuals, partnerships, corporations, associations or public or private
8 organizations of any character.

9 (h) "Procedural rule" means every rule, as defined in subdivision (j) of this section, which
10 fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency,
11 including forms prescribed by the agency.

12 (i) "Proposed rule" is a legislative rule, interpretive rule or a procedural rule which has not
13 become effective pursuant to the provisions of this chapter or law authorizing its promulgation.

14 (j) "Rule" includes every rule, standard or statement of policy or interpretation of general
15 application and future effect, including the amendment or repeal of the rule, affecting constitutional,
16 statutory or common law rights, privileges or interests, or the procedures available to the public,
17 adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or
18 administered by it or to govern its organization or procedure, but does not include rules relating
19 solely to the internal management of the agency, nor rules of which notice is customarily given to
20 the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative
21 rule", "interpretive rule" or "procedural rule", all as defined in this section, and is effective only as
22 provided in this chapter.

23 (k) "Rulemaking" means the process for the formulation, amendment or repeal of a rule as

1 provided in this chapter.

2 **§29A-1-3a. Technical amendments to a current rule.**

3 The provisions of this chapter do not apply to purely technical amendments to a current rule,
4 including correcting addresses, phone numbers, punctuation, spelling, code citations or internal
5 citations, numbering, grammatical errors or changes to language to standardize rules generally
6 without affecting the content of any rule. An agency may make these amendments by filing the
7 corrected rule with the Secretary of State's office.

8 **§29A-1-3b. Void rules.**

9 If an agency ceases to exist, through the operation of law or by statute, any rules adopted or
10 promulgated by the agency are void on the date the agency ceases to exist, unless the agency's
11 rule-making power and its rules have been transferred to another agency.

12 **ARTICLE 3. RULEMAKING.**

13 **§29A-3-1a. Filing proposed amendments to an existing rule; and repealing an existing rule.**

14 (a) An agency shall file all sections of the proposed rule when proposing an amendment to
15 an existing rule. The proposed rule shall be accompanied by note of explanation as to the effect of
16 the amendment and its relation to the existing rules.

17 (b) An agency proposing to repeal a rule, shall file the rule in its entirety with the provisions
18 of the rule struck through. An agency may not repeal a rule by reference in another rule.

19 **§29A-3-4. Filing of proposed legislative exempt rules, procedural rules and interpretive rules.**

20 (a) When an agency proposes a legislative exempt rule, procedural rule or an interpretive
21 rule, the agency shall file in the State Register a notice of its action, including the text of the rule as
22 proposed.

23 (b) All proposed rules filed under subsection (a) of this section shall have a fiscal note

1 attached itemizing the cost of implementing the rules as they relate to this state and to persons
2 affected by the rules. The fiscal note shall include all information included in a fiscal note for either
3 house of the Legislature and a statement of the economic impact of the rule on the state or its
4 residents. The objectives of the rule shall be clearly and separately stated in the fiscal note by the
5 agency issuing the proposed rules. A legislative exempt, procedural or interpretive rule is not void
6 or voidable by virtue of noncompliance with this subsection.

7 **§29A-3-8. Adoption of legislative exempt, procedural and interpretive rules.**

8 An agency shall consider a legislative exempt, procedural and interpretive rule for adoption
9 not later than six months after the close of public comment and file a notice of withdrawal or
10 adoption in the State Register within that period. An agency's failure to file the notice constitutes
11 withdrawal and the Secretary of State shall note the failure in the State Register immediately upon
12 the expiration of the six-month period.

13 A legislative exempt, procedural or interpretive rule may be amended by the agency prior to
14 final adoption without further hearing or public comment. The amendment may not change the main
15 purpose of the rule. If the fiscal implications have changed since the rule was proposed, the agency
16 shall attach a new fiscal note to the notice of filing. Upon adoption of the rule, including any
17 amendment, the agency shall file the text of the adopted legislative exempt, procedural or
18 interpretive rule with its notice of adoption in the State Register and the rule is effective on the date
19 specified in the rule or thirty days after the filing, whichever is later or as specified in this code.

20 **§29A-3-13. Adoption of legislative rules; effective date.**

21 (a) Except as the Legislature may by law otherwise provide, within sixty days after the
22 effective date of an act authorizing promulgation of a legislative rule, the agency shall promulgate
23 the rule in conformity with the provisions of law authorizing and directing the promulgation of the

1 rule. In the case of a rule proposed by an agency which is administered by an executive department
2 pursuant to the provisions of article two, chapter five-f of this code, the secretary of the department
3 shall promulgate the rule as authorized by the Legislature. In the case of an agency which is not
4 subject to administration by the secretary of an executive department, the agency which proposed
5 the rule for promulgation shall promulgate the rule as authorized by the Legislature.

6 (b) A legislative rule authorized by the Legislature is effective upon filing in the State
7 Register, or on the effective date fixed by the authorizing act or, if none is fixed by law, a later date
8 not to exceed ninety days, as fixed by the agency.

9 (c) The Secretary of State shall note in the State Register the effective date of an authorized
10 and promulgated legislative rule and shall promptly publish the duly promulgated rule in the Code
11 of State Rules maintained by his or her office.

12 **§29A-3-15. Emergency legislative rules; procedure for promulgation; definition.**

13 (a) Any agency with authority to propose legislative rules may, without hearing, find that an
14 emergency exists requiring that an emergency rule be promulgated and promulgate the emergency
15 rule in accordance with this section. The agency shall file the emergency rule, together with a
16 statement of the facts and circumstances constituting the emergency and a listing of state agencies,
17 professions, businesses and other identifiable interest groups affected by the proposed emergency
18 rule, with the Secretary of State, who shall publish a notice of the filing in the State Register.
19 However, an agency's good faith failure to list all known state agencies, professions, businesses and
20 other identifiable interest groups is not a basis for disapproval of the emergency rule or does not
21 subject the emergency rule to judicial review. The emergency rule becomes effective upon the
22 approval of the Secretary of State in accordance with section fifteen-a of this article or upon the
23 approval of the Attorney General in accordance with section fifteen-b of this article or upon the

1 forty-second day following the filing, whichever occurs first. The emergency rule may adopt, amend
2 or repeal any legislative rule, but the agency shall state, with particularity, the circumstances
3 constituting the emergency requiring the adoption, amendment or repeal, and the emergency rule is
4 subject to de novo review by any court having original jurisdiction of an action challenging its
5 validity. An agency shall immediately file a copy of the emergency rule and the required statement
6 with the Secretary of State and one copy with the Legislative Rule-Making Review Committee.

7 An emergency rule is effective for not more than fifteen months and expires earlier if any of
8 the following occurs:

9 (1) The Secretary of State, acting under the authority provided in section fifteen-a of this
10 article, or the Attorney General, acting under the authority provided in section fifteen-b of this
11 article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the
12 emergency rule exceeds the scope of the law authorizing or directing the promulgation of the rule;
13 (B) an emergency does not exist justifying the promulgation of the emergency rule; or (C) the
14 emergency rule was not promulgated in compliance with the provisions of this section. An
15 emergency rule may not be disapproved pursuant to the authority granted by clauses (A) or (B) of
16 this subdivision on the basis that the Secretary of State or the Attorney General disagrees with the
17 underlying public policy established by the Legislature in enacting the authorizing legislation. An
18 emergency rule which would otherwise be approved as being necessary to comply with a time
19 limitation established by this code or by a federal statute or regulation may not be disapproved
20 pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the
21 agency has failed to file the emergency rule prior to the date fixed by the time limitation. When the
22 authorizing statute specifically directs an agency to promulgate an emergency rule, or specifically
23 finds that an emergency exists and directs the promulgation of an emergency rule, the emergency rule

1 may not be disapproved pursuant to the authority granted by paragraph (B) of this subdivision. An
2 emergency rule may not be disapproved on the basis that the Legislature has not specifically directed
3 an agency to promulgate the emergency rule, or has not specifically found that an emergency exists
4 and directed the promulgation of an emergency rule;

5 (2) The agency has not previously filed and fails to file a notice of public hearing on the
6 proposed rule within thirty days of the date the proposed rule was filed as an emergency rule, in
7 which case the emergency rule expires on the thirty-first day;

8 (3) The agency has not previously filed and fails to file the proposed rule as approved by the
9 agency following the close of the public comment period with the Legislative Rule-Making Review
10 Committee within ninety days of the date the proposed rule was filed as an emergency rule, in which
11 case the emergency rule expires on the ninety-first day;

12 (4) The Legislature has authorized or directed promulgation of an authorized legislative rule
13 dealing with substantially the same subject matter since the emergency rule was first promulgated,
14 in which case the emergency rule expires on the date the authorized rule is made effective; or

15 (5) The Legislature has, by law, disapproved the emergency rule, in which case the
16 emergency rule expires on the date the law becomes effective.

17 (b) Any amendment to an emergency rule made by the agency shall be filed in the State
18 Register and does not constitute a new emergency rule for the purpose of acquiring additional time
19 or avoiding the expiration dates in subdivision (2), (3), (4) or (5), subsection (a) of this section:
20 *Provided*, That the emergency amendment becomes effective upon the approval of the Secretary of
21 State in accordance with section fifteen-a of this article or upon approval of the Attorney General
22 in accordance with section fifteen-b of this article or upon the forty-second day following the filing,
23 whichever occurs first.

1 (c) Once an emergency rule expires due to the conclusion of fifteen months or due to the
2 effect of subdivision (2), (3), (4) or (5), subsection (a) of this section, the agency may not refile the
3 same or similar rule as an emergency rule.

4 (d) An agency may not use the provisions of this section to avoid or evade any provision of
5 this article or any other provisions of this code, including any provisions for legislative review and
6 approval of proposed rules. Any emergency rule promulgated for that purpose may be contested in
7 a judicial proceeding before a court of competent jurisdiction.

8 (e) The Legislative Rule-Making Review Committee may review any emergency rule to
9 determine: (1) Whether the emergency rule or an amendment to the emergency rule exceeds the
10 scope of the law authorizing or directing its promulgation; (2) whether there exists an emergency
11 justifying the promulgation of the emergency rule; and (3) whether the emergency rule was
12 promulgated in compliance with the requirements and prohibitions contained in this section. The
13 committee may recommend to the agency, the Legislature or the Secretary of State any action it
14 determines appropriate.

15 (f) For the purposes of this section, an emergency exists when the promulgation of an
16 emergency rule is necessary: (1) For the immediate preservation of the public peace, health, safety
17 or welfare; (2) to comply with a time limitation established by this code or by a federal statute or
18 regulation; or (3) to prevent substantial harm to the public interest.