

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

House Bill 4046

(BY DELEGATES SOBONYA, FRICH AND MOFFATT)

[Originating in the Committee on the Judiciary;

February 27, 2016.]

1 A BILL to amend and reenact article 2, chapter 64 of the Code of West Virginia, 1931, as
2 amended, relating generally to the promulgation of administrative rules by the Department
3 of Administration; authorizing certain of the agencies to promulgate certain legislative rules
4 with various modifications presented to and recommended by the Legislative Rule-Making
5 Review Committee; authorizing certain agencies and commissions under Department of
6 Administration to repeal certain legislative, procedural or interpretative rules that are no
7 longer authorized or are obsolete; authorizing the Department of Administration to
8 promulgate a legislative rule relating to the purchasing division; repealing Department of
9 Administration legislative rule relating to the availability of state surplus buildings and
10 equipment to charity food banks; authorizing the Consolidated Public Retirement Board to
11 promulgate a legislative rule relating to benefit determination and appeal; authorizing the
12 Consolidated Public Retirement Board to promulgate a legislative rule relating to the
13 Teachers' Defined Contribution System; authorizing the Consolidated Public Retirement
14 Board to promulgate a legislative rule relating to the Teachers' Retirement System;
15 authorizing the Consolidated Public Retirement Board to promulgate a legislative rule
16 relating to refund, reinstatement, retroactive service, loan and correction of error interest
17 factors; authorizing the Consolidated Public Retirement Board to promulgate a legislative
18 rule relating to service credit for accrued and unused sick leave; authorizing the
19 Consolidated Public Retirement Board to promulgate a legislative rule relating to the West
20 Virginia State Police; authorizing the Consolidated Public Retirement Board to promulgate
21 a legislative rule relating to the Deputy Sheriff Retirement System; authorizing the Ethics
22 Commission to promulgate a legislative rule relating to the public use of names or
23 likenesses; repealing Ethics Commission legislative rule relating to advisory opinions;
24 repealing Ethics Commission legislative rule relating to guidelines and standards for
25 determining the existence of disqualifying financial interests; repealing Ethics Commission
26 legislative rule relating to contributions; authorizing the Division of Personnel to

27 promulgate a legislative rule relating to the administrative rule of the West Virginia Division
 28 of Personnel; repealing State Building Commission procedural rule relating to procedural
 29 rules for meetings; repealing Public Employees Insurance Agency procedural rules
 30 relating to procedural rules for the Public Employees Insurance Agency Advisory Board;
 31 and repealing Board of Risk and Insurance Management legislative rule relating to
 32 discontinuation of professional malpractice insurance. .

Be it enacted by the Legislature of West Virginia:

1 That article 2, chapter 64 of the Code of West Virginia, 1931, as amended, be amended
 2 and reenacted to read as follows:

**ARTICLE 2. AUTHORIZATION FOR THE DEPARTMENT OF ADMINISTRATION TO
 PROMULGATE LEGISLATIVE RULES.**

§64-2-1. Department of Administration.

1 (a) The legislative rule filed in the State Register on September 1, 2015, authorized under
 2 the authority of section four, article three, chapter five-a, of this code, relating to the Department
 3 of Administration (Purchasing Division, 148 CSR 1), is authorized.

4 (b) The legislative rule effective on April 3, 1991, authorized under the authority of section
 5 seven, article eight, chapter nine of this code, relating to the Department of Administration
 6 (availability of state surplus buildings and equipment to charity food banks, 148 CSR 5), is
 7 repealed.

§64-2-2. Consolidated Public Retirement Board.

1 (a) The legislative rule filed in the State Register on July 28, 2015, authorized under the
 2 authority of section one, article ten-d, chapter five, of this code, modified by the Consolidated
 3 Public Retirement Board to meet the objections of the Legislative Rule-making Review Committee
 4 and refiled in the State Register on November 5, 2015, relating to the Consolidated Public
 5 Retirement Board (benefit determination and appeal, 162 CSR 2), is authorized.

6 (b) The legislative rule filed in the State Register on July 28, 2015, authorized under the
7 authority of section one, article ten-d, chapter five, of this code, modified by the Consolidated
8 Public Retirement Board to meet the objections of the Legislative Rule-making Review Committee
9 and refiled in the State Register on September 22, 2015, relating to the Consolidated Public
10 Retirement Board (Teachers' Defined Contribution System, 162 CSR 3), is authorized with the
11 following amendment:

12 On page 7, subsection 7.4.1, line 4, following the word "amounts" and the period, by
13 adding the following: "Using irrevocably forfeited amounts pursuant to the authority of this
14 subsection will reduce the employer contributions in future years as required by W. Va. Code §18-
15 7B-11."

16 (c) The legislative rule filed in the State Register on July 28, 2015, authorized under the
17 authority of section one, article ten-d, chapter five, of this code, modified by the Consolidated
18 Public Retirement Board to meet the objections of the Legislative Rule-making Review Committee
19 and refiled in the State Register on September 22, 2015, relating to the Consolidated Public
20 Retirement Board (Teachers' Retirement System, 162 CSR 4), is authorized.

21 (d) The legislative rule filed in the State Register on July 28, 2015, authorized under the
22 authority of section one, article ten-d, chapter five, of this code, modified by the Consolidated
23 Public Retirement Board to meet the objections of the Legislative Rule-making Review Committee
24 and refiled in the State Register on September 22, 2015, relating to the Consolidated Public
25 Retirement Board (refund, reinstatement, retroactive service, loan and correction of error interest
26 factors, 162 CSR 7), is authorized.

27 (e) The legislative rule filed in the State Register on July 28, 2015, authorized under the
28 authority of section one, article ten-d, chapter five, of this code, relating to the Consolidated Public
29 Retirement Board (service credit for accrued and unused sick leave, 162 CSR 8), is authorized.

30 (f) The legislative rule filed in the State Register on July 28, 2015, authorized under the
31 authority of section one, article ten-d, chapter five, of this code, modified by the Consolidated

32 Public Retirement Board to meet the objections of the Legislative Rule-making Review Committee
33 and refiled in the State Register on November 5, 2015, relating to the Consolidated Public
34 Retirement Board (West Virginia State Police, 162 CSR 9), is authorized.

35 (g) The legislative rule filed in the State Register on July 28, 2015, authorized under the
36 authority of section one, article ten-d, chapter five, of this code, modified by the Consolidated
37 Public Retirement Board to meet the objections of the Legislative Rule-making Review Committee
38 and refiled in the State Register on November 5, 2015, relating to the Consolidated Public
39 Retirement Board (Deputy Sheriff Retirement System, 162 CSR 10), is authorized.

§64-2-3. Ethics Commission.

1 (a) The legislative rule filed in the State Register on June 30, 2015, authorized under the
2 authority of section five-c, article two, chapter six-b, of this code, relating to the Ethics Commission
3 (public use of names or likenesses, 158 CSR 21), is authorized with the amendment set forth
4 below:

5 On page one, following section one, by striking out the remainder of the proposed rule,
6 and inserting in lieu thereof the following:

“§158-21-2. Definitions.

1 2.1. “Advertising” means publishing, distributing, disseminating, communicating or
2 displaying information to the general public through audio, visual, or other media tools. This
3 includes, but is not limited to, billboard, radio, television, mail, electronic mail, publications,
4 banners, table skirts, magazines, social media, websites, and other forms of publication,
5 dissemination, display or communication.

6 2.2. “Agent” means any volunteer or employee, contractual or permanent, serving at the
7 discretion of a public official or public employee.

8 2.3. “Educational materials” means publications, guides, calendars, handouts, pamphlets,
9 reports or booklets intended to provide information about the public official or governmental office.
10 This includes information or details about the office, services the office provides to the public,

11 updates on laws and services, and other informational items that are intended to educate the
12 public.

13 2.4. "Entertainment activities" means a gala, party, dance, reception, event or celebration
14 whose primary purpose is social interaction, a performance, or a non-governmental function.

15 2.5. "Instructional material" means written instructions explaining or detailing steps for
16 completion of a governmental agency document or form.

17 2.6. "Likeness" means a photograph, drawing, or other attempted depiction of an
18 individual.

19 2.7. "Mass media communication" means communication through audio, visual, or other
20 media tools (including U.S. mail, electronic mail, and social media) intended for general
21 dissemination to the public. Examples include mass mailing by U.S. mail, list-serve emails, and
22 streaming clips on websites.

23 2.7.a. This term does not include regular responses to constituent requests or questions
24 during the normal course of business.

25 2.7.b. This term does not include communications that are authorized or required by law
26 to be publicly disseminated (e.g. legal notices).

27 2.8. "Public employee" means any full-time or part-time employee of any state, county or
28 municipal governmental body, and their respective boards, agencies, departments and
29 commissions, or in any other regional or local governmental agency.

30 2.9. "Public official" means any person who is elected or appointed to any state, county or
31 municipal office or position, including boards, agencies, departments and commissions, or in any
32 other regional or local governmental agency.

33 2.10. "Public payroll" means payment of public monies as a wage or salary from any state,
34 county or municipal governmental body, or any other regional or local governmental agency,
35 whether accepted or not.

36 2.11. "Social media" means forms of electronic communication through which users create
37 online communities to share information, ideas, personal messages, and other content.

38 2.11.a. This term includes web and mobile-based technologies which are used to turn
39 communication to interactive dialogue among organizations, communities, and individuals.
40 Examples are: Facebook, MySpace, Twitter, YouTube, etc.

41 2.12. "Trinkets" means items of tangible personal property that are not vital or necessary
42 to the duties of the public official's or public employee's office, including, but not limited to, the
43 following: magnets, mugs, cups, key chains, pill holders, band-aid dispensers, fans, nail files,
44 matches and bags.

§158-21-3. Persons subject to W.Va. Code §6B-2-5c.

1 3.1. These provisions shall apply to all elected and appointed public officials and public
2 employees, their agents, and any other person on public payroll.

§158-21-4. Placement on publicly-owned vehicles

1 4.1. A public official's name or likeness may not be placed on any publicly-owned vehicle.

2 4.2. If, as of May 28, 2015, a public official's name or likeness is unable to be removed
3 easily from the vehicle, or at a de minimis expense to the public official's agency, the public official
4 may seek a written exemption from the West Virginia Ethics Commission for allowance of such
5 name or likeness to remain on the vehicle.

6 4.2.a. Any exemption request must be publicly presented and considered by the Ethics
7 Commission.

8 4.2.b. Any exemption for a permanently affixed name or likeness shall terminate upon the
9 replacement of the vehicle or when there is a substantial repair or alteration of the vehicle.

10 4.2.c. During the duration of such exemption, the marked vehicle may not be utilized in
11 parades, public appearances, or placed on public display during such public appearance or
12 parade. In addition, the Ethics Commission may require additional conditions as part of an

13 exemption in order to limit promotion of the public official, including limiting use or placement of
14 the vehicle.

§158-21-5. Placement on Trinkets.

1 5.1. A public official's name or likeness may not be placed on any trinkets paid for with
2 public funds.

3 5.2. When appropriate and reasonable, public officials are permitted to expend a minimal
4 amount of public funds for the purchase of pens, pencils or other markers to be used during
5 ceremonial signings.

§158-21-6. Advertising.

1 6.1. A public official's name or likeness may not be placed on any advertising, mass media
2 communication, or non-emergency public service announcement that is paid for with public funds.

3 6.1.a. When necessary, reasonable, and appropriate to relay specific public safety, health
4 or emergency information, a public official's name and likeness may be used in a mass media
5 communication or other public announcement.

6 6.1.b. A public official's name and likeness may appear on an agency's social media and
7 websites provided it complies with section §9 of this rule.

8 6.1.c. Dissemination of office press releases or agency information via email, social media
9 or other public media tools for official purposes is not considered advertising or prohibited under
10 this rule, so long as it is intended for (a) a legitimate news or informational purpose, (b) is not
11 intended as a means of promotion of the public official, and (c) is not being used as educational
12 material. See §8 and 11.1 of this rule.

13 6.2. If public funds are not used, use of the public official's name or likeness on advertising,
14 media communication, or non-emergency public service announcement may still be prohibited
15 and/or subject to other prohibitions of ethics act, including but not limited to use of public office
16 for private gain, and endorsement. Under such a situation, written guidance should first be

17 obtained from the Executive Director or the Ethics Commission prior to allowing or authorizing a
18 public official's name or likeness on the advertising, media communication, or non-emergency
19 public service announcement.

§158-21-7. Entertainment Activities.

1 7.1. A public official, or his/her agent, may not use public funds or public employees for
2 entertainment activities within forty-five days of a primary, general or special election in which he
3 or she is a candidate.

4 7.1.a. This prohibition shall not apply to public employees performing security services,
5 including, but not limited to, law enforcement, division of public safety personnel, or part-time
6 security.

7 7.1.b. As used in this rule and W.Va. Code § 6B-2-5c (a)(4), the phrase "within forty-five
8 days" means forty-five days prior to the day designated for a primary, general or special election.

9 7.2. Outside of the forty-five day period, public officials and public employees are still
10 subject to the Ethics Commission rules governing use of public funds for employee retirement
11 and recognition events, as well as the prohibition against use of public office for private gain.

12 7.2.a. Nothing shall be inferred or construed to infer that the expenditure of public funds
13 for entertainment activities outside of the forty-five day period is otherwise permitted under the
14 Ethics Act or this rule.

§158-21-8. Educational Materials.

1 8.1. A public official's name or likeness may not be placed on any educational material
2 that is paid for with public funds.

3 8.1.a. This prohibition shall not apply to the submission of a report required to be issued
4 by law.

5 8.2. If public funds are not used, use of the public official's name or likeness on educational
6 materials may still be prohibited and/or subject to other prohibitions of ethics act, including but not
7 limited to use of public office for private gain. Under such a situation, written guidance should first

8 be obtained from the Ethics Commission or its Executive Director prior to allowing or authorizing
9 a public official's name or likeness on educational materials.

§158-21-9. Public Agency Social Media; Website.

1 9.1. A public official's name and likeness may appear on a public agency's website and
2 social media subject to the following restrictions:

3 a. The public official's name may appear throughout the website so long as it is
4 reasonable, incidental, appropriate, and has a primary purpose to promote the agency's mission
5 and services rather than to promote the public official.

6 b. The public official's likeness may only appear on the agency's website home page and
7 on any pages or sections devoted to biographical information regarding the official.

8 c. The public official's name and likeness may appear on the agency's social media so
9 long as it is reasonable, incidental, appropriate, and has a primary purpose to promote the
10 agency's mission and services rather than to promote the public official.

11 9.2. In such situations in which the name or likeness is authorized, it shall not be
12 overemphasized or otherwise used as a means to promote the public official.

13 9.3. These restrictions shall not apply to a public official's or employee's personal or
14 campaign social media accounts.

15 9.4 Public officials and employees are cautioned against using public resources to
16 manage or post to personal or campaign social media as it may violate the prohibition of use of
17 public office for private gain under the Ethics Act.

18 9.5. An agency's website or social media may not provide links or reference to a public
19 official's or public employee's personal or campaign social media or website.

§158-21-10. Use of public resources to display/distribute.

1 10.1. Unless otherwise permitted in this rule or W.Va. Code §6B-2-5c, public officials and
2 employees may not use public resources to display or distribute trinkets, educational material or
3 advertising with their name or likeness.

4 10.1.a. This prohibition includes trinkets, educational material or advertising paid for with
5 non-public funds, personal funds, third-party funds, campaign funds, and those that have been
6 provided through an in-kind gift to the public agency or official.

7 10.1.b. The prohibition against using public resources includes offices, counters, vehicles,
8 and other public spaces maintained or controlled by the public official's or employee's agency.

§158-21-11. Exceptions to Use of Name or Likeness.

1 11.1. Public officials are not prohibited from using their names or likenesses on any official
2 record or report, letterhead, document or certificate, or instructional material issued in the course
3 of their duties as public officials.

4 11.1.a. Other official documents used in the normal course of duties for the agency may
5 include the public official's name, including but not limited to, facsimile cover sheets, press release
6 headers, office signage, and envelopes.

7 11.1.a.1. Banners and table skirts are deemed advertising and may not include the public
8 official's name or likeness.

9 11.1.a. 2. If such official documents are reproduced for distribution or dissemination to the
10 public as educational material, the items are subject to the prohibitions contained in §8 of this
11 rule.

12 11.1.a. 3. Nothing shall be interpreted as prohibiting public officials from using public funds
13 to communicate with constituents in the normal course of their duties as public officials so long
14 as such communications do not include any reference to voting in favor of the public official in an
15 election.

16 11.1. b. If used, the public official's name and likeness shall not be overemphasized, used
17 as a means to promote the public official, or violate other provisions of the Ethics Act, including
18 specifically use of public office for private gain.

19 11.2. When appropriate and reasonable, the West Virginia Division of Tourism may use a
20 public official's name and likeness on material use for tourism promotion.

21 11.2.a. If used, the public official's name and likeness shall not be overemphasized, used
22 as a means to promote the public official, or violate other provisions of the Ethics Act, including
23 specifically use of public office for private gain.

24 11.3. The prohibitions contained in this rule or W.Va. Code §6B-2-5c do not apply to any
25 person who is employed as a member of the faculty or staff, including administration, of a public
26 institution of higher education and who is engaged in teaching, research, consulting or publication
27 activities in his or her field of expertise with public or private entities and thereby derives private
28 benefits from such activities when the activity is approved as a part of an employment contract
29 with the governing board of the institution or has been approved by the employee's department
30 supervisor or the president of the institution by which the faculty or staff member is employed.

31 11.4. The prohibitions contained in this rule or W.Va. Code §6B-2-5c do not apply to a
32 public official's campaign-related expenditures or materials.

33 11.5. The prohibitions contained in this rule or W.Va. Code §6B-2-5c do not apply to items
34 paid for with the public official's personal money.

35 11.6. The prohibitions contained in this rule or W.Va. Code §6B-2-5c do not apply to items
36 or materials required by law to contain the public official's name or likeness.

§158-21-12. Existing Items as of the Effective Date.

1 12.1. If a public official, public employee, or public agency possesses items or materials
2 in contravention of this rule or W.Va. Code §6B-2-5c that were purchased prior to the effective
3 date of the statute (May 28, 2015), the public official, public employee or public agency may not
4 continue to distribute, disseminate, communicate or display publicly these items or materials.

5 12.1.a. The materials may be used publicly if the public official's name or likeness are
6 permanently removed or covered (e.g. stickers across the names, names marked out, etc.).

7 12.1.b. The public agency may utilize such items or material for internal use (e.g. pencils,
8 pens) so long as they are not publicly distributed, disseminated, communicated or displayed.

9 12.1.c. When appropriate and in compliance with law, a public agency may donate such
10 items to surplus, charity, or an organization serving the poor and needy.

11 12.2. If, as of May 28, 2015, a public official's name or likeness on an item or material is
12 unable to be removed easily or at a de minimis expense to the public official's agency, the public
13 official may seek a written exemption from the West Virginia Ethics Commission for allowance of
14 such name or likeness.

15 12.2.a. Any exemption request must be publicly presented and considered by the Ethics
16 Commission.”

17 (b) The legislative rule effective on September 1, 1993, authorized under the authority of
18 section two, article two, chapter six-b of this code, relating to Ethics Commission (advisory
19 opinions, 158 CSR 2), is repealed.

20 (c) The legislative rule effective on April 10, 1995, authorized under the authority of section
21 twenty-eight, article twenty, chapter thirty-one of this code, relating to Ethics Commission
22 (guidelines and standards for determining the existence of disqualifying financial interests, 158
23 CSR 4), is repealed.

24 (d) The legislative rule effective on June 1, 1992, authorized under the authority of section
25 one, article two, chapter six-b of this code, relating to Ethics Commission (contributions, 158 CSR
26 10), is repealed.

§64-2-4. Division of Personnel.

1 The legislative rule filed in the State Register on July 21, 2015, authorized under the
2 authority of section ten, article six, chapter twenty-nine, of this code, relating to the Division of
3 Personnel (administrative rule of the West Virginia Division of Personnel, 143 CSR 1), is
4 authorized with the following amendment:

5 On page 48, by removing the strikethrough of subparagraph 14.3.f.1, and restoring the
6 original language, with modification, to read as follows:

7 14.3.f.1. An employee may elect to be paid in installments at his or her usual rate and
 8 frequency of pay as if employment were continuing until the pay period during which the accrued
 9 annual leave is exhausted. If the last day for which leave payment is due falls before the day on
 10 which the pay period ends, terminal annual leave payment for those days within that pay period
 11 shall be calculated using the daily rate for pay period in which the last day on payroll occurs.
 12 Employees in positions allocated to job classes assigned to an hourly pay schedule or per diem
 13 pay schedule approved by the Board shall be paid according to those standard procedures;

14 And renumbering the subparagraphs thereafter; and

15 On page 50, by removing the strikethrough in subparagraph 14.4.e.2, and restoring the
 16 original language of subparagraph 14.4.e.2.

§64-2-5. State Building Commission.

1 The procedural rule effective on July 21, 1995, authorized under the authority of section
 2 three, article nine-a, chapter six of this code, relating to the State Building Commission
 3 (procedural rules for meetings, 159 CSR 1), is repealed.

§64-2-6. Public Employees Insurance Agency.

1 The procedural rule effective on June 20, 1991, authorized under the authority of section
 2 six, article sixteen, chapter five of this code, relating to the Public Employees Insurance Agency
 3 (procedural rules for the Public Employees Insurance Agency Advisory Board, 151 CSR 5), is
 4 repealed.

§64-2-7. Board of Risk and Insurance Management.

1 The legislative rule effective on April 14, 1992, authorized under the authority of section
 2 five, article twelve, chapter twenty-nine of this code, relating to the Board of Risk and Insurance
 3 Management (discontinuation of professional malpractice insurance, 115 CSR 4), is repealed.

NOTE: The purpose of this bill is to authorize the rules of the Department of Administration.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.