

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Engrossed

Committee Substitute

for

Senate Bill 619

BY SENATORS BLAIR, CARMICHAEL, CLINE, GAUNCH,

KARNES, MULLINS AND TRUMP

[Originating in the Committee on Government

Organization; reported on February 24, 2016]

1 A BILL to amend and reenact §29A-3-5 and §29A-3-11 of the Code of West Virginia, 1931, as
2 amended; to amend said code by adding thereto two new sections, designated §29A-3-
3 19 and §29A-3-20; and to amend said code by adding thereto a new section, designated
4 §29A-3A-20, all relating to legislative rulemaking; requiring agencies respond to public
5 comments during the rule-making process; requiring five-year expiration provisions in all
6 future rules promulgated by executive agencies and higher education, but with provided
7 exceptions; requiring expiration provisions in all future modifications of rules affecting
8 agencies and higher education, but with provided exceptions; providing that any rule
9 containing an expiration provision shall remain in effect after the expiration date and until
10 the rule is modified or repealed; requiring agencies to explain why or why not public
11 comments were incorporated into the rule; providing that failure of an agency to
12 adequately explain why or why not public comments were incorporated into the rule is
13 grounds for rejection of the rule; requiring additional information to be included when an
14 agency submits proposed rules to the Legislative Rule-Making Review Committee,
15 including an economic impact statement, detailed description of the purpose or objective
16 of the rule, explanation of the statutory authority, public comments and written responses
17 by the agency concerning those comments; requiring the agency's response address each
18 issue and concern expressed by the comments received and whether the rule will be
19 overly burdensome on business and industry by setting forth specific factors that must be
20 addressed; requiring all executive branch agencies to review and evaluate all rules,
21 guidelines, policies and recommendations with those any federal counterparts and
22 determine if the state's rules, guidelines, policies and recommendations are more
23 stringent; and requiring each agency to review each of its rules within four years to
24 determine if its rules should be continued without change, modified or repealed, and to
25 submit a report to the Legislative Rule-Making Review Committee.

Be it enacted by the Legislature of West Virginia:

1 That §29A-3-5 and §29A-3-11 of the Code of West Virginia, 1931, as amended, be
2 amended and reenacted; that said code be amended by adding thereto two new sections,
3 designated §29A-3-19 and §29A-3-20; and that said code be amended by adding thereto a new
4 section, designated §29A-3A-20, all to read as follows:

ARTICLE 3. RULEMAKING.

§29A-3-5. Notice of proposed rulemaking.

1 When an agency proposes to promulgate a rule other than an emergency rule, it shall file
2 with the Secretary of State, for publication in the State Register, a notice of its action, including
3 therein any request for the submission of evidence to be presented on any factual determinations
4 or inquiries required by law to promulgate such rule. At the time of filing the notice of its action,
5 the agency shall also file with the Secretary of State a copy of the full text of the rule proposed
6 and a fiscal note as defined in subsection (b), section four of this article. If the agency is
7 considering alternative draft proposals, it may also file with the Secretary of State the full text of
8 such draft proposals.

9 The notice shall fix a date, time and place for the receipt of public comment in the form of
10 oral statements, written statements and documents bearing upon any findings and determinations
11 which are a condition precedent to the final approval by the agency of the proposed rule, and
12 shall contain a general description of the issues to be decided. If no specific findings and
13 determinations are required as a condition precedent to the final approval by the agency of the
14 approved rule, the notice shall fix a date, time and place for the receipt of general public comment
15 on the proposed rule. To comply with the public comment provisions of this section, the agency
16 may hold a public hearing or schedule a public comment period for the receipt of written
17 statements and documents, or both.

18 If findings and determinations are a condition precedent to the promulgation of such rule,
19 then an opportunity for general public comment on the merits of the rule shall be afforded after
20 such findings and determinations are made. In such event, notice of the hearing or of the period

21 for receiving public comment on the proposed rule shall be attached to and filed as a part of the
22 findings and determinations of the agency when filed in the State Register.

23 In any hearing for public comment on the merits of the rule, the agency may limit
24 presentations to written material. The time, date and place fixed in the notice shall constitute the
25 last opportunity to submit any written material relevant to any hearing, all of which may be earlier
26 submitted by filing with the agency. After the public hearing or the close of the public comment
27 period, whichever is later, the agency shall not permit the filing or receipt of, nor shall it consider,
28 any attempted ex parte communications directed to it in the form of additional comment prior to
29 the submission of its final agency-approved rule to the Legislative Rule-Making Review
30 Committee pursuant to the provisions of section eleven of this article.

31 The agency may also, at its expense, cause to be published as a Class I legal publication
32 in every county of the state any notice required by this section.

33 Any citizen or other interested party may appear and be heard at such hearings as are
34 required by this section.

35 Prior to the submission of any agency approved proposed rule to the Secretary of State,
36 the agency shall respond to public comments received during the rule-making process and
37 explain the reasoning for comments being incorporated or not incorporated into the rule. Failure
38 to adequately respond to public comments shall be grounds for rejection of the proposed rule by
39 the Secretary of State.

**§29A-3-11. Submission of legislative rules to the Legislative Rule-Making Review
Committee.**

1 (a) When an agency finally approves a proposed legislative rule for submission to the
2 Legislature, pursuant to the provisions of section nine of this article, the secretary of the executive
3 department which administers the agency pursuant to the provisions of article two, chapter five-f
4 of this code shall submit to the Legislative Rule-Making Review Committee at its offices or at a

5 regular meeting of such committee ~~fifteen copies of~~ a number of copies in electronic or paper form
6 as requested by the committee, which shall include the following information:

7 (1) The full text of the legislative rule as finally approved by the agency, with new language
8 underlined and with language to be deleted from any existing rule stricken through but clearly
9 legible;

10 (2) ~~a~~ A brief summary of the content of the legislative rule and a description and a copy of
11 any existing rule which the agency proposes to amend or repeal;

12 (3) ~~a~~ A statement of the circumstances which require the rule;

13 (4) A detailed description of the rule's purpose and all proposed changes to the rule;

14 ~~(4)~~ (5) A fiscal note containing all information included in a fiscal note for either house of
15 the Legislature and a statement of the economic impact of the rule on the state or its residents;

16 (6) An economic impact statement addressing the probable effect of the proposed rule on
17 the economy of the State of West Virginia, including, but not limited to, the effect of the regulation
18 on employment, job creation or reduction, and compensation. The agency may work with the
19 West Virginia University Bureau of Business and Economics Research or the Center for Business
20 and Economic Research at Marshall University to prepare the statement. The statement shall
21 include the names of those persons who participated in the drafting of the statement and the time
22 spent preparing the statement. The agency shall also make available a lead author of the
23 statement or other qualified representative of the agency to discuss the statement with the
24 Legislative Rule-Making Review Committee and any committee of the Senate or House of
25 Delegates to which the rule is referred;

26 (7) A public health impact statement assessing the health impact of the proposed rule on
27 the State of West Virginia, including, but not limited to, the effect of the regulation on the short-
28 term and long-term health impact on the citizens of the state and whether there will be any
29 detrimental public health impact from the rule. The agency may work with the Bureau of Public
30 Health or any public university department that has sufficient expertise to determine the impact of

31 the rule on public health. The statement shall include the names of those persons who participated
32 in the drafting of the statement and the time spent preparing the statement. The agency shall also
33 make available the lead author of the statement or other qualified representative of the agency to
34 discuss the statement with the Legislative Rule-Making Committee and any committee of the
35 Senate or House of Delegates to which the rule is referred

36 ~~(5) one~~ (8) One copy of any relevant federal statutes or regulations; and

37 (9) An explanation of the statutory authority for the rule, including a detailed summary of
38 the effect of each provision of the rule with citation to the specific statute which empowers the
39 agency to enact such provision;

40 (10) All public comments for each proposed rule. An agency may consolidate substantially
41 similar comments in the interest of efficiency;

42 (11) All written responses by the agency to the substance of any public comments
43 received, including whether the agency chose to modify the proposed rule in response to the
44 comments or, if no changes were made, the rationale for declining to incorporate or make any
45 suggested changes responding to the public comments. An agency may consolidate substantially
46 similar responses in the interest of efficiency: *Provided*, That the agency's response shall address
47 each issue and concern expressed by all comments received; and

48 ~~(6) any~~ (12) Any other information which the committee may request or which may be
49 required by law. If the agency is an agency, board or commission which is not administered by an
50 executive department as provided for in article two, chapter five-f of this code, the agency shall
51 submit the final agency-approved rule as required by this subsection.

52 (b) The committee shall review each proposed legislative rule and, in its discretion, may
53 hold public hearings thereon. Such review shall include, but not be limited to, a determination of:

54 (1) Whether the agency has specific statutory authority to propose the rule and has not
55 exceeded the scope of its statutory authority in approving the proposed legislative rule;

56 (2) Whether the proposed legislative rule is in conformity with the legislative intent of the
57 statute which the rule is intended to implement, extend, apply, interpret or make specific;

58 (3) Whether the proposed legislative rule overlaps, duplicates or conflicts with any other
59 provision of this code, ~~or with~~ any other rule adopted by the same or a different agency, with
60 federal statutes and rules, or with local laws and rules;

61 (4) Whether the proposed legislative rule is necessary to fully accomplish the objectives
62 of the statute under which the rule was proposed for promulgation;

63 (5) Whether the proposed legislative rule is reasonable, especially as it affects the
64 convenience of the general public or of persons particularly affected by it;

65 (6) Whether the proposed legislative rule could be made less complex or more readily
66 understandable by the general public; ~~and~~

67 (7) Whether the proposed legislative rule was proposed for promulgation in compliance
68 with the requirements of this article and with any requirements imposed by any other provision of
69 this code;

70 (8) Whether the proposed legislative rule will be overly burdensome on business and
71 industry by considering criteria that includes, but is not limited to, the potential impact on:

72 (A) Job creation;

73 (B) Economic growth;

74 (C) Investment;

75 (D) Competitiveness;

76 (E) Entrepreneurial activity;

77 (F) Innovation;

78 (9) Whether the agency complied with all requirements of:

79 (A) Subsection (a) of this section; and

80 (B) Section five of this article regarding the agency's mandatory response to public
81 comments with an explanation as to why comments were or were not incorporated into the
82 proposed rule; and

83 (10) Whether the proposed legislative rule will negatively impact public health based on
84 the public health impact statement and other relevant considerations presented to the committee.

85 (c) After reviewing the legislative rule, the committee shall recommend that the
86 Legislature:

87 (1) Authorize the promulgation of the legislative rule; ~~or~~

88 (2) Authorize the promulgation of part of the legislative rule; ~~or~~

89 (3) Authorize the promulgation of the legislative rule with certain amendments; ~~or~~

90 (4) Recommend that the proposed rule be withdrawn; or

91 (5) Reject the proposed rule.

92 The committee shall file notice of its action in the State Register and with the agency
93 proposing the rule: *Provided*, That when the committee makes the recommendations of
94 subdivision (2), (3), ~~or~~ (4) or (5) of this subsection, the notice shall contain a statement of the
95 reasons for such recommendation.

96 (d) When the committee recommends that a rule be authorized, in whole or in part, by the
97 Legislature, the committee shall instruct its staff or the office of Legislative Services to draft a bill
98 authorizing the promulgation of all or part of the legislative rule and incorporating such
99 amendments as the committee desires. If the committee recommends that the rule not be
100 authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together
101 with a recommendation. Any draft bill prepared under this section shall contain a legislative finding
102 that the rule is within the legislative intent of the statute which the rule is intended to implement,
103 extend, apply or interpret and shall be available for any member of the Legislature to introduce to
104 the Legislature.

§29A-3-19. Expiration provision in rules.

1 (a) Any new legislative rule promulgated pursuant to this article after April 1, 2016, shall
2 include an expiration provision terminating the rule after five years: *Provided*, That the rule may
3 be renewed for additional terms of five years or less by the Legislature pursuant to the rule-making

4 procedures and authority in this article: *Provided, however,* That if a different expiration or
5 termination provision exists in the statute under which the proposed rule is promulgated, the
6 enabling statute's provision shall control: *Provided further,* That this subsection does not apply to
7 rules promulgated by the Department of Environmental Protection or emergency rules
8 promulgated pursuant to section fifteen of this article.

9 (b) Any legislative rule existing as of April 1, 2016, that is thereafter modified pursuant to
10 this article shall include an expiration provision as part of the modification setting forth a
11 termination date for the rule: *Provided,* That the rule may be renewed for additional terms of years
12 by the Legislature pursuant to the rule-making procedures and authority in this article: *Provided,*
13 *however,* That if a different expiration or termination provision exists in the statute under which
14 the proposed rule is promulgated, the enabling statute's provision shall control: *Provided further,*
15 That this subsection does not apply to rules promulgated by the Department of Environmental
16 Protection or emergency rules promulgated pursuant to section fifteen of this article.

17 (c) Any rule containing an expiration provision shall remain in effect after the expiration
18 date and until the rule is modified or repealed.

19 (d) The existence of an expiration provision terminating a rule does not preclude the repeal
20 of such rule by the Legislature prior to the expiration of the expiration provision.

21 (e) As part of its rule review under this article, the Legislative Rule-Making Review
22 Committee is authorized to establish a procedure for timely review of all rules prior to expiration,
23 including those rules promulgated by agencies that have affirmatively sought renewal prior to
24 expiration. The procedure may include a requirement that the agency show cause as to why the
25 expiring rule is required and necessary to be continued for another term of years.

26 (f) The Secretary of State shall provide notice to the promulgating agency at least eighteen
27 months prior to every rule's expiration date and said notice shall direct that the agency provide
28 and the agency shall provide the following information to the Secretary of State:

29 (1) Whether the rule is needed and reasoning for such;

30 (2) Whether federal funding will be impacted by its expiration and an explanation as to
31 such; and

32 (3) Any adverse effect that will result from expiration of the rule to the agency, and whether
33 health and safety of the residents of the state, or any regulated persons, will be impacted by the
34 rule.

35 (g) The Secretary of State shall publish agency responses in the State Register and the
36 agency shall include this response with rule documents required for filing for reauthorization of
37 each rule with the Legislative Rule-Making Review Committee pursuant to section eleven of this
38 article.

§29A-3-20. Executive review of agency rules, guidelines, policies and recommendations.

1 (a) All executive agencies with rule-making authority shall:

2 (1) Review and evaluate all state rules, guidelines, policies and recommendations under
3 their jurisdiction that have similar federal rules, guidelines, policies and recommendations;

4 (2) Determine whether the state rules, guidelines, policies and recommendations are more
5 stringent than federal counterparts;

6 (3) Provide for a comment period for all rules, guidelines, policies and recommendations;
7 and

8 (4) Submit a report to the Joint Committee on Government and Finance and the Legislative
9 Rule-Making Review Committee on or before November 1, 2017, which shall include:

10 (A) A description of the state rules, guidelines, policies and recommendations that are
11 more stringent than federal counterparts; and

12 (B) Comments received from the comment period provided for in subdivision (3) of this
13 subsection.

14 (b) Within four years of the enactment of this law, each executive agency with rule-making
15 authority shall review all of its rules and determine whether the rules should be continued without
16 change, modified or repealed. On or before July 1, 2020, each agency submit a report to the

17 Legislative Rule-Making Review Committee which includes the following information for each rule
18 under the agency's jurisdiction:

19 (1) A description of the rule;

20 (2) A determination of whether the rule should continue without change, modified or
21 repealed; and

22 (3) The reasoning for said determination.

ARTICLE 3A. HIGHER EDUCATION RULEMAKING.

§29A-3A-20. Expiration provision in rules.

1 (a) Any new legislative rule promulgated pursuant to this article after April 1, 2016, shall
2 include an expiration provision terminating the rule after five years: *Provided*, That the rule may
3 be renewed for additional terms of five years or less by the Legislature pursuant to the rule-making
4 procedures and authority in this article: *Provided, however*, That if a different expiration or
5 termination provision exists in the statute under which the proposed rule is promulgated, the
6 enabling statute's provision shall control: *Provided further*, That this subsection does not apply to
7 emergency rules promulgated pursuant to section sixteen of this article.

8 (b) Any legislative rule existing as of April 1, 2016, that is thereafter modified pursuant to
9 this article shall include an expiration provision as part of the modification setting forth a
10 termination date for the rule: *Provided*, That the rule may be renewed for additional terms of years
11 by the Legislature pursuant to the rule-making procedures and authority in this article: *Provided,*
12 *however*, That if a different expiration or termination provision exists in the statute under which
13 the proposed rule is promulgated, the enabling statute's provision shall control: *Provided further,*
14 That this subsection does not apply to emergency rules promulgated pursuant to section sixteen
15 of this article.

16 (c) Any rule containing an expiration provision shall remain in effect after the expiration
17 date and until the rule is modified or repealed.

18 (d) The existence of an expiration provision terminating a rule does not preclude the repeal
19 of such rule by the Legislature prior to the expiration of the expiration provision.

20 (e) As part of its rule review under this article, the Legislative Oversight Commission on
21 Education Accountability is authorized to establish a procedure for timely review of a rule prior to
22 its expiration if the board has affirmatively sought renewal prior to expiration. The procedure may
23 include a requirement that the board show cause as to why the expiring rule is required and
24 necessary to be continued for another term of years.

25 (f) The Secretary of State shall provide notice to the board at least eighteen months prior
26 to every rule's expiration date, and the notice shall direct that the board provide: Whether the rule
27 is needed; whether federal funding will be impacted by its expiration; any adverse effect that will
28 result by expiration of the rule to the board; and whether the health or safety of the residents of
29 the state or any persons regulated will be impacted by the rule.

30 (g) The Secretary of State shall publish the board's responses in the State Register. The
31 board shall include this response with rule documents required for filing for reauthorization of each
32 rule with the commission pursuant to section ten of this article.