

AUGUST 9

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TUESDAY, AUGUST 9, 1994, 12:00 NOON - 2:00 P.M.

SENATE FINANCE COMMITTEE ROOM - M-451

1. Approval of Minutes - Meeting June 14, 1994
2. Review of Legislative Rules:
 - a. West Virginia Ethics Commission
Guidelines and Standards for Determining the Existence
of Disqualifying Financial Interests
 - b. Division of Natural Resources
Minimum requirements for handling and firing of handguns
 - c. Division of Natural Resources
Recycling Assistance Fund Grant Program
 - d. Department of Agriculture
Animal Disease Control
 - e. Division of Environmental Protection
Standards for Certification of Blasters - Surface Coal
Mines
 - f. Division of Public Safety
Division of Public Safety Grievance Procedure
 - g. Governor's Committee on Crime, Delinquency and
Correction
Protocol for Law Enforcement Response to Domestic
Violence
 - h. West Virginia Board of Medicine
Fees for Services Rendered by the Board of Medicine
 - i. West Virginia State Board of Examiners for Licensed
Practical Nurses
Fees for Services Rendered by the Board
 - j. West Virginia State Board of Examiners for Licensed
Practical Nurses
Policies Regulating Licensure of the Licensed Practical
Nurse
3. Other Business:
 - September Interims - Wheeling

Tuesday, August 9, 1994

12:00 Noon - 2:00 p.m.

Legislative Rule-Making Review Committee
Code §29A-3-10)

Keith Burdette
ex officio nonvoting member

Robert "Chuck" Chambers,
ex officio nonvoting member

Senate

House

Manchin, Chairman
Grubb
Anderson (absent)
Macnaughtan
Minard
Boley

Gallagher, Chairman
Douglas
Compton
Huntwork (absent)
Burk
Faircloth

The meeting was called to order by Mr. Manchin, Co-Chairman.

The minutes of the June 14, 1994 meeting were approved.

Debra Graham, Committee Counsel, explained that the rule proposed by the West Virginia Ethics Commission, Guidelines and Standards for Determining the Existence of Disqualifying Financial Interests, had been laid over at the June meeting because representatives of the Commission were not at the meeting to answer questions from the Committee. Mr. Manchin asked if there was anyone present representing the Commission. There was no one present representing the Commission.

Mr. Gallagher moved that the proposed rule be placed at the foot of the agenda and that the staff call and request that a representative of the Commission come to the meeting. The motion was adopted.

Major Bill Daniel, Division of Natural Resources, explained the rule proposed by the Division, Minimum requirements for handling and firing of handguns, and stated that the Division has agreed to technical modifications. He responded to questions from the Committee.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was rejected.

Ms. Graham explained the rule proposed by the Division of Natural Resources, Recycling Assistance Fund Grant Program, and told the Committee that the Division has agreed to technical modifications. Ollie Harvey, Recycling Coordinator, and Harry Price, Executive Secretary of the Division, answered questions from the Committee.

Mr. Gallagher moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Manchin noted that a representative of the Ethics Commission was present at the meeting and placed the rule proposed by the Commission, Guidelines and Standards for Determining the Existence of Disqualifying Financial Interests, next on the agenda. Robert Lamont, Counsel to the Commission, highlighted the amendments contained in the proposed rule and responded to questions from the Committee.

Ms. Compton moved that the proposed rule be approved as modified. The motion was adopted.

Bob Morris, Department of Agriculture, reviewed the rule proposed by the Department, Animal Disease Control, and stated that the Department has agreed to technical modifications.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Roger Hall, Division of Environmental Protection, explained the rule proposed by the Division, Standards for Certification of Blasters - Surface Coal Mines, and stated that the Division has agreed to technical modifications. He answered questions from the Committee.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Gary Griffith, Deputy Superintendent of the Division of Public Safety, reviewed the rule proposed by the Division, Division of Public Safety Grievance Procedure, and told the Committee that the Division has agreed to technical modifications. He responded to questions from the Committee.

Mr. Faircloth moved that the proposed rule be approved as modified. The motion was adopted.

Don Davidson, responsible for Law Enforcement Training, reviewed the rule proposed by the Governor's Committee on Crime, Delinquency and Correction, Protocol for Law Enforcement Response to Domestic Violence, and stated that the Committee has agreed to technical modifications. He and Corporal Jeff Moses, Fayette County Sheriff's Office, responded to questions from the Committee.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Deborah Rodecker, Counsel to the Board of Medicine, explained the rule proposed by the Board, Fees for Services Rendered by the Board of Medicine, and stated that the Board has agreed to technical modifications. She responded to questions from the Committee.

Mr. Faircloth moved that the proposed rule lie over until the Committee's next meeting. The motion was adopted.

Mr. Minard, having voted on the prevailing side, moved that the Committee reconsider its action whereby it rejected the motion to approve the rule proposed by the Division of Natural Resources, Minimum requirements for handling and firing of handguns. The motion was adopted.

Mr. Minard moved that the proposed rule lie over until the Committee's next meeting. The motion was adopted.

Lanette Anderson, Assistant Executive Secretary to the West Virginia State Board of Examiners for Licensed Practical Nurses, explained the rule proposed by the Board, Fees for Services Rendered by the Board, and stated that the Board has agreed to technical modifications. She and Nancy Wilson, Executive Secretary to the Board, responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Anderson explained the rule proposed by the West Virginia State Board of Examiners for Licensed Practical Nurses, Policies Regulating Licensure of the Licensed Practical Nurse, and stated that the Board has agreed to technical modifications. She answered questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Manchin told members of the Committee that the Committee would not meet during the September Interim Meetings in Wheeling.

The meeting was adjourned.

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Leg. Rule-Making Review

DATE: August 9, 1994

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly Paul OWENS	Chas.	Daily Mail	
Bill DANIEL	Chas.	DNR	IF NEEDED.
Bob MARZ'S	NADA Chas	Dept of Ag	
DEBORAH Lewis Rodecker	WV Chas	for Bd. of Med	
Raymond Hall	Nitro	DNR	757-0515
Ollie M. Harvey	Chas.	DNR	
James Albert	Chas	Gov's Comm on Crime	
Donald Davidson	"	" " " "	
Ron Thompson	Beckley	Delegate-elect	
Becky Payne	Chas	DNR	

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: August 9, 1994

TIME: 12:00 - 2:00pm.

NAME

Present Absent Yeas Nays

Chambers, Robert "Chuck", Speaker

Brian Gallagher, Co-Chair

Burk, Robert W., Jr.

Faircloth, Larry V.

Douglas, Vickie

Compton, Mary P.

Huntwork, John

Burdette, Keith, President

Joe Manchin, III Co-Chair

Anderson, Leonard

Grubb, David

Minard, Joseph

Macnaughtan, Don

Boley, Donna

TOTAL

Present	Absent	Yeas	Nays
✓			
✓			
✓			
✓			
✓			
✓			
✓			
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✓			
✓			

RE: _____

Memorandum

To: The Legislative Rule-Making Review Committee
From: Joe Altizer
Date: August 3, 1994

RE: What Authority do state agencies have in establishing and altering fee schedules?

Introduction

The crux of this issue is whether an agency-created fee, which in effect is a tax on the regulated party, is in violation of the state constitution's vesting of the Legislature as the sole taxing authority. As the below discussion shows, there is no dispute that an agency can set or modify fees when the enabling legislation gives express authority for the creation of such fee as part of the agency's regulatory process. It also appears that the agency can create new fees as long as the fee is within the parameters of the Legislature's intent to allow that agency to regulate the area that the fee encompasses. There is no case law on point, and this memo's prediction is based on the West Virginia Supreme Court's (WVSC) decisions on similar types of statutory construction. For purposes of convenience the word "agency" includes all boards and agencies authorized to create rules.

Analysis

1. The Court gives deference to Agencies and the Legislature-

The first step in analyzing the authority an agency has in charging and collecting fees is to look at the statute from which the agency is asserting authority. The fee charged by the agency must be within the granted regulatory authority of the agency. Agency compliance with legislative intent is a requirement of all agency rules per West Virginia Code (WVC) §29A-3-13.

Although there is no West Virginia Supreme Court decision specifically regarding fees, several Court decisions lend insight to what the Court sees as appropriate/inappropriate agency rule making. The rule has been a lenient standard: "Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts." Perilli v. Board of Education, 387 S.E.2d 315 (1989).

In Human Rights Commission v. Pearlman Realty Agency, 1161 W.Va. 1 (1977), the Court recognized authority in the Human Rights Commission to award compensatory damages without trial by jury. The Court found that the Commission's authority to issue cease and desist orders created an implied authority to assess damages.

The Legislature, in delegating discretionary power to an agency "must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient to guide such agency in the exercise of the power conferred upon it." Quesenberry v. Estep, 142 W.Va. 426 (1956). This was reaffirmed in the recent court case State Lottery Commission v. Polan, No.21768 WVSC, (September 1993). Here the Court found that the statute was too vague, granting the agency "unbridled authority in the exercise of the power conferred upon it." at p. . In this case the Legislature had not expressly authorized video lottery, and the Court struck the decision down.

In WV St. Board of Health, 70 S.E.2d 903, (1952), the Court recognized the extensive powers of the Board of Health but limited the powers to those needed in the "administration of the power granted to" the board, at p.906.

This was further expanded in State Human Rights Commission v. Pauley, where the Court reaffirmed that an administrative agency can only exert such powers as granted by the Legislature, but that beside the express authority granted by statute, agencies also are conferred such powers as are "reasonably and necessarily implied in exercise of it's duties." 212 S.E.2d at 79, (1975).

However, the Court has also made it clear that "an agency can not issue a regulation which is out of harmony with or which alters or limits the statute being administered" Rowe v. WV Dept. of Corrections, 292 S.E.2d 650, (1982). The agency is restrained by both statute and case law to the confines of legislative authorization.

The Court also has found that the delegation of power to the state agency has to be of "purely legislative power" in order to render a statute constitutionally defective. Purely legislative power was defined as the authority to make a complete law. Woodring v. Whyte, 242 S.E.2d. at 243 (1978). With these series of decisions it is clear that there is deference to agencies when promulgating rules in meeting with legislative directives.

Two recent Attorney General Opinions have been given regarding whether agency actions have exceeded statutory authority. A December 23, 1987 Opinion recognized that the authority of the Racing Commission to regulate the racing industry included the authority to regulate the fees which horse jockeys are paid. An October 22, 1986 Opinion affirmed that the Division of Oil and Gas had as part of its regulatory authority, the power to assess penalties and hold hearings as part of its regulatory authority over the oil and gas industry. Both Opinions recognized implied authority to enforce the agencies regulations from expressed authority to regulate industries.

A older Attorney General Opinion, provided July 17, 1953 to the Department of Labor is on point to the issue of whether a agency could fix a fee without specific legislative authorization. The opinion concluded that the agency could not.

However, this opinion is not persuasive. Two of the cases cited from other states were not particularly convincing arguments. There were two cases cited from the West Virginia Court but they were taken out of context, and in fact one case cited, Chapman v. Housing Authority, 3 S.E. 2d 502 (1939), the Court ruled that the City of Huntington was not in violation of state law by establishing its own condemnation procedures in an state authorized urban renewal project.

2. Should fees be treated differently than other rule making authority?

When the agency creates a fee and requires a portion of the public to pay that fee, that fee is in effect a tax levied on that party. This authority is expressly reserved in the West Virginia Constitution to the Legislature. Article 10 §1 of the WV Constitution grants authority in the Legislature to "tax privileges, franchises, and incomes of persons and corporations...." The right to establish and apply fees is clearly in the purview of the Legislature. There are no recent cases specifically on point delineating what fee mechanisms are acceptable. But there are two older cases that have recognized the authority of the Legislature to delegate taxing power to local school boards. Townsend v. Board of Education, 68 W.Va. 49 (1910), and Dillon v. County Court, 60 W.Va. 339, (1907).

This question has not been resolved in West Virginia. In Pauley the Court sets out a flexible standard for agencies to comply with their administrative charge. The Court quoted Am. Jur. 2d Administrative Law § 44; "'An administrative agency has, and should be accorded, every power which is indispensable to the powers expressly granted, that is, those powers which are necessarily, or fairly reasonably, implied as an incident to the powers expressly granted.'" Pauley at p.79

The answer to the two issues posed in this memo seem to lie in the code itself for each individual agency. If there is language in the code that can be seen as reasonable authority to authorize the fee and the agency has tied the fee into its legislative "charge," then nothing prevents an agency from creating a fee in addition to fees expressly authorized. If the agency has gone beyond its legislative purpose then it is likely to be disallowed.

Conclusion-

Since the rule is submitted to the Legislative Rule-Making and Review Committee and later adopted as law by the Legislature, the Legislature is approving these rules. This adds to the argument that the agencies are allowed, with subsequent legislative approval of their legislative rules, to assess and create fees as long as the fees are within the scope and purpose of the agency's statutory authority.