

US EPA ARCHIVE DOCUMENT

APPENDIX VII  
WEST VIRGINIA CODE  
CHAPTER 29A

## CHAPTER 29A.

# STATE ADMINISTRATIVE PROCEDURES.

### Article

1. Definitions and Application of Chapter, §§ 29A-1-1 to 29A-1-3.
2. State Register, §§ 29A-2-1 to 29A-2-9.
3. Rule Making, §§ 29A-3-1 to 29A-3-17.

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**W. Va. Law Review.** — For a survey of law in 1979, see 82 W. Va. L. Rev. 723 (1980).  
developments in West Virginia administrative

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**This chapter reflects an unambiguous legislative commitment** to effective public participation in administrative rule making and insures that West Virginia administrative agencies are not permitted the luxury of conducting their rule-making activities insulated from public sentiment and views. Op. Att'y Gen., Oct. 31, 1980, No. 15.

## ARTICLE 1.

### DEFINITIONS AND APPLICATION OF CHAPTER.

Sec.

- 29A-1-1. Legislative findings and statement of purpose.
- 29A-1-2. Definitions of terms used in this chapter.
- 29A-1-3. Application of chapter; limitations.

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**Revision of article.** — Acts 1982, c. 121 amended and reenacted this article with the following changes. Section 29A-1-1 was added by the 1982 act. Former §§ 29A-1-1 (now § 29A-1-2) and 29A-1-2 (now § 29A-1-3) were transferred to their present locations and were so extensively amended as to make a detailed comparison impossible.

**Effect of Administrative Procedures Act.** — The effect of the enactment of the Admin-

istrative Procedures Act is to require that all rules and regulations adopted by any state agency be first presented to the legislature for ratification; all other delegations of legislative authority to adopt substantive rules and regulations have been withdrawn. *West Virginia Mfrs. Ass'n v. West Virginia*, 714 F.2d 308 (4th Cir. 1983).

**§ 29A-1-1. Legislative findings and statement of purpose.**

The legislature finds and declares that administrative law and the administrative practice and procedure of the various executive and administrative officers, offices and agencies comprises a body of law and policy which is voluminous, often formulated without adequate public participation and collected and preserved for public knowledge and use in an unacceptable and essentially inaccessible fashion. The legislature further finds that the delegation of its legislative powers to other departments and agencies of government requires of the legislature that the rules and regulations of such other departments and agencies, which have the force and effect of law because of their legislative character, should be carefully and extensively reviewed by the legislature in a manner properly respectful of the separation of powers but in keeping with the legislative force and effect of such rules and regulations. Accordingly the legislature has and by this chapter intends to fix by law uniform and settled administrative practices and procedures, subject only to enumerated exceptions, for the exercise of executive rule-making authority and for the exercise by executive and administrative officers, offices and agencies of lawfully delegated legislative power, with appropriate legislative review of that exercise of such a delegated legislative authority and with established procedures for legislative oversight of the exercise of executive rule-making authority.

In that light chapter twenty-nine-a [§ 29-A-1-1 et seq.] of this Code establishes, with enumerated exceptions, procedures for rule making, declaratory rulings by agencies and the conduct of contested administrative cases, together with a plan for the systematic preparation, public consideration, orderly promulgation, preservation and public availability of the body of law, policy and administrative decisions within the purview of this chapter. (1982, c. 121.)

W. Va. Law Review. — Survey of Recent Developments in West Virginia Law: Judicial Review of Department of Welfare Decisions, 85

W. Va. L. Rev. 415 (1983).

Stated in *Serian v. State*, 297 S.E.2d 889 (W. Va. 1982).

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

For the purposes of this chapter:

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

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

(c) "Interpretive rule" means every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this Code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions.

(d) "Legislative rule" means every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature. Except where otherwise specifically provided in this Code, legislative rule does not include (A) findings or determinations of fact made or reported by an agency, including any such findings and determinations as are required to be made by any agency as a condition precedent to proposal of a rule to the legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one [§ 29A-4-1], article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive orders or proclamations by the governor issued solely in the exercise of executive power, including executive orders issued in the event of a public disaster or emergency;

(e) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) by any agency of any matter other than rule making;

(f) "Person" includes individuals, partnerships, corporations, associations or public or private organizations of any character;

(g) "Procedural rule" means every rule, as defined in subsection (i) of this section, which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency;

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

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

(j) "Rule making" means the process for the formulation, amendment or repeal of a rule as provided in this chapter. (1964, c. 1; 1982, c. 121.)

**Editor's note.** — The cases below were decided under this section as it existed prior to the 1982 revision of this article.

**Agency action.** — The dismissal of a sex discrimination complaint after a finding of probable cause was an agency action affecting the legal rights, duties, interests and privileges of a specific party required to be determined by

a hearing and falls squarely within the statutory definition of contested cases. *Currey v. State Human Rights Comm'n*, 273 S.E.2d 77 (W. Va. 1980).

**Stated in** *Serian v. State*, 297 S.E.2d 889 (W. Va. 1982).

**Cited in** *Harrison v. Ginsberg*, 286 S.E.2d 276 (W. Va. 1982).

### § 29A-1-3. Application of chapter; limitations.

(a) The provisions of this chapter do not apply in any respect whatever to executive orders of the governor, which orders to the extent otherwise lawful, shall be effective according to their terms: Provided, that the executive orders shall be admitted to record in the state register when and to the extent the governor deems suitable and shall be included therein by the secretary of state when tendered by the governor.

(b) Except as to requirements for filing in the state register, and with the legislature or its rule-making review committee, provided in this chapter or other law, the provisions of this chapter do not apply in any respect whatever to the West Virginia board of probation and parole, the public service commission, the board of public works sitting as such, the West Virginia board of education and the West Virginia board of regents: Provided, that rules of such agencies shall be filed in the state register in the form prescribed by this chapter and be effective no sooner than sixty consecutive days after being so filed: Provided, however, that such agencies may promulgate emergency rules in conformity with section fifteen [§ 29A-3-15], article three of this chapter.

(c) The provisions of this chapter do not apply to rules relating to, or contested cases involving, public elections, the conduct of inmates or other



## § 29A-1-3

## STATE ADMINISTRATIVE PROCEDURES

persons admitted to public institutions, the conduct of students at public schools or public educational institutions, the open seasons and the bag, creel, size, age, weight and sex limits with respect to the wildlife in this State, the conduct of persons in military service or the receipt of public assistance, but two certified copies of each such rule shall be filed in the state register.

(d) Nothing herein shall be construed to affect, limit or expand any express and specific exemption from this chapter contained in any other statute relating to a specific agency, but such exemptions shall be construed and applied in accordance with the provisions of this chapter to effectuate any limitations on such exemptions contained in any such other statute. (1964, c. 1; 1982, c. 121.)

**Editor's note.** — The cases below were decided under this section as it existed prior to the 1982 revision of this article.

**Proceedings of the board of regents are exempt** from the provisions of this chapter. *Clarke v. West Virginia Bd. of Regents*, 279 S.E.2d 169 (W. Va. 1981).

**Certiorari proper where chapter inapplicable.** — Certiorari is the proper means for obtaining judicial review of a decision made by a state agency not covered by the Administrative Procedures Act. *State ex rel. Ginsberg v. Watt*, 285 S.E.2d 367 (W. Va. 1981).

**Decision of commissioner of department of health** to suspend pharmacists from participation as vendors of pharmacy services in the Medical Services of the State of West Virginia was one which related to "the receipt of public assistance" and thus was not within the scope of the Administrative Procedures Act. *State ex rel. Ginsberg v. Watt*, 285 S.E.2d 367 (W. Va. 1981).

**Cited in** *Serian v. State*, 297 S.E.2d 889 (W. Va. 1982).

## ARTICLE 2.

## STATE REGISTER.

Sec.

29A-2-1. Duty of the secretary of state.

29A-2-2. State register created.

29A-2-3. Contents of state register.

29A-2-4. Contents of state register deemed a public record.

29A-2-5. Agency rules to be filed in state register; failure to file.

Sec.

29A-2-6. Format and numbering of agency rules filed in state register.

29A-2-7. Publication of state register.

29A-2-8. Publication of rules by agencies.

29A-2-9. Making orders and records available.

**Revision of article.** — Acts 1982, c. 121 amended and reenacted this article. The revision was so extensive as to make impossible a detailed comparison with the former article.

**Mandamus available to compel secretary of state's performance.** — Refusal of the secretary of state to perform the duties imposed upon him by this article subjects the secretary of state to a mandamus action to compel the performance of those duties. *Op. Att'y Gen.*, Dec. 15, 1982, No. 9.

**Priority of required functions in funding allocations.** — The secretary of state is under a statutory mandate to implement the provisions of this article, notwithstanding an actual

or claimed lack of funds for the tasks. As with other executive officials faced with similar circumstances, he must allocate his available funds to those functions required by law, and only after those functions have been performed is he free to devote funds to discretionary activities. *Op. Att'y Gen.*, Dec. 15, 1982, No. 9.

**Legislature's budget bill cannot negate duties imposed by this article.** — The legislature's failure to include appropriations for the specific line items "Rules and Regulations Division" and "Publication of State Register" in the budget bill for fiscal year 1982-1983 cannot legally supersede or negate the new and expanded legal duties imposed upon the secre-

tary of state in this article. Op. Att'y Gen., Dec. 15, 1982, No. 9.

### § 29A-2-1. Duty of the secretary of state.

It is the nondiscretionary, nondelegable duty of the secretary of state to establish and maintain the state register hereby created, and offer copies for subscription and public distribution in accordance with the provisions of this article. (1982, c. 121.)

W. Va. Law Review. — Ramey,  
Constitutional Law. 84 W. Va. L. Rev. 560  
(1982).

### § 29A-2-2. State register created.

There is hereby created in the office of the secretary of state, a public record to be known and denominated as the state register, to be established, compiled, indexed and copied, and such copies offered for subscription and distribution, in accordance with the provisions of this article. (1982, c. 121.)

### § 29A-2-3. Contents of state register.

The secretary of state shall receive and file in the state register:

- (a) Every notice of a proposed rule or a public hearing for the finding of facts or public comment on a proposed rule.
- (b) The text of every proposed rule and subsequent proposed amendment thereto and fiscal notes attached thereto.
- (c) Every determination of fact or judgment tendered by an agency for inclusion therein and every notice of submission to the legislature or its rule-making review committee made in conformity with this chapter.
- (d) Every executive order tendered by the governor.
- (e) Every notice of and the text of any report or finding of the legislative rule-making review committee and such other material as may be tendered by the clerk or presiding officer of either house of the legislature for filing in the state register.
- (f) Such other material related to administrative procedures and actions as an agency may desire to make a public record or the secretary of state may deem appropriate, or where required by law.
- (g) Notice of and the text of any action by an agency of the legislature or its committees relative to the process of promulgation of rules tendered to the secretary of state for inclusion in the register.
- (h) Every other paper required by law to be filed in such register or which may be filed therein in order to comply with any other provision of law. (1982, c. 121.)



**§ 29A-2-4**

## STATE ADMINISTRATIVE PROCEDURES

**§ 29A-2-4. Contents of state register deemed a public record.**

Every paper filed in the state register shall be a public record provable and admissible as evidence if otherwise relevant, of which judicial notice may be taken, either under lawful certification or by reason of duplication and distribution as a copy of the state register in accordance with this article. (1982, c. 121.)

**§ 29A-2-5. Agency rules to be filed in state register; failure to file.**

(a) Notwithstanding any filing prior to the effective date of this section [May 11, 1982], each agency shall hereafter file in the state register a certified copy of all of its lawfully adopted rules which are in force on the date of such filing and all of its proposed rules which have not become effective prior to the date of such filing. All such rules and proposed rules shall be arranged, compiled, numbered and indexed in accordance with the provisions of section six [§ 29A-2-6] of this article, and shall also include a designation of each rule as either legislative rule, interpretive rule or procedural rule. Any agency desiring to pursue promulgation of a rule proposed prior to the effective date of this section but not then yet effective, shall refile such proposed rule, following the procedure set forth in article three [§ 29A-3-1 et seq.]: Provided, that it shall not be necessary for the agency to again hold a public hearing to determine facts or public comment, but in all other respects the procedures provided for the promulgation of rules under this section shall be complied with. On or before the first day of January, one thousand nine hundred eighty-three, any other agency required by law to file its rules in the state register in order for such rules to be effective shall resubmit and refile such rules in accordance with this section. If any agency fails to file a certified copy of any rule or proposed rule in accordance with this section on or before the first day of January, one thousand nine hundred eighty-three, then such rule or proposed rule not so filed shall be thereafter void and unenforceable and shall be of no further force and effect except as to enforcement of its effective provisions for actions, causes or matters occurring prior to the first day of January, one thousand nine hundred eighty-three.

(b) Except for such changes in the designation and numbering of a rule, including numerical references within a rule, as are required to comply with the provisions of section six [§ 29A-2-6] of this article, no legislative rule filed under the provisions of this section may be amended in any way prior to such filing unless such amendment is made in compliance with the requirements of article three [§ 29A-3-1 et seq.] of this chapter. (1982, c. 121.)

**Construction of savings clause of § 29A-3-17.** — The savings clause of § 29A-3-17, which states that "any rule lawfully promulgated prior to the effective date of this chapter shall remain in full force and

effect," does not affect the requirements of this section concerning the refiling of proposed rules, since the phrase "lawfully promulgated" cannot mean a rule or regulation merely published or approved by an agency and can

only be interpreted to encompass rules or regulations that have met all conditions precedent to the effectiveness prescribed by law. Op. Att'y Gen., Nov. 18, 1982, No. 8.

**Effect of regulations set to be effective May 20, 1982.** — Where effective date of regulations was set on May 20, 1982, and on May 11, 1982, an amendment to this chapter became effective which required the approval of the full

legislature of all "legislative" rules promulgated by executive agencies of the state, the regulations were only "proposed rules" for the purposes of this section, which required the department to follow the amended procedures of this chapter in order to pursue promulgation of the regulations. Op. Att'y Gen., Nov. 18, 1982, No. 8.

### **§ 29A-2-6. Format and numbering of agency rules filed in state register.**

(a) Each rule or proposed rule filed by an agency in the state register shall include as its initial provision: (1) A statement identifying such rule as a legislative rule, an interpretive rule, or a procedural rule, as the case may be; (2) a statement of each section, article and chapter of this Code to which such rule or any part thereof relates; and (3) a statement of the section, article and chapter of this Code or any other provision of law which provides authority for the promulgation of such rule. The agency shall be estopped from relying on any authority for the promulgation of such rule which is not stated therein in accordance with the requirements of this subdivision.

(b) An agency which files the rule is required, to the extent practicable, to compile, number and index such rule in sequence according to the number of the section, article and chapter of this Code to which such rule or any part thereof relates.

Each rule when filed to be finally effective shall have attached thereto an abstract of its promulgation history prepared by the agency showing the date of the filing in the state register of the content of, or notice of any procedure relating to, action necessary under this chapter to cause such rule to be finally effective: Provided, that any error or omission in such abstract shall not effect the validity of any rule or action in respect thereto.

(c) The secretary of state may prescribe by legislative rule a standard size and format for rules to be filed in the state register and he may prescribe such procedural or interpretive rules as he deems advisable to clarify and interpret the provisions of this section. The secretary of state shall refuse to accept for filing any rules which do not comply with the specific provisions of this section, and he may refuse to accept for filing any rules which do not comply with the procedural rules issued by him pursuant to this section until the rules sought to be filed are brought into conformity with the secretary of state's procedural rules.

(d) Unless and until the secretary of state prescribes otherwise by rule issued and made effective under the provisions of subsection (c) of this section, each rule filed in the state register shall be on white paper measuring eight and one-half inches by eleven inches, typewritten and single-spaced, with a one inch margin at the top, bottom and each side of each page, and shall be reproduced photographically, or by xerography or other duplication process. The secretary of state may grant specific exceptions to such requirements in the case of maps, diagrams and exhibits, if the same may not be conveniently

folded and fastened with the other pages of rules and in the case of rules which incorporate the promulgation of a federal agency or other organization which could not be submitted in the standard size and format except at undue expense. Materials submitted for inclusion in the state register shall be fastened on the left side by two or more fasteners attached through holes suitable for insertion into ring binders. (1982, c. 121.)

**§ 29A-2-7. Publication of state register.**

(a) The legislature intends that the secretary of state offer to the public convenient and efficient access to copies of the state register or parts thereof desired by the citizens. The provisions of this section are enacted in order to provide a means of doing so pending any other means provided by law or legislative rule.

(b) Until the first day of January, one thousand nine hundred eighty-three, the secretary of state may use any procedure he adopts to fulfill the objects of this section including any of the procedures provided in this section.

(c) On and after the first day of January, one thousand nine hundred eighty-three, and the refiling of all rules effective on the effective date [May 11, 1982] of this section the body of the rules thus refiled together with (1) those rules made effective from and after the effective date of this section (2) all proposed rules not yet effective on and before the first day of January, one thousand nine hundred eighty-three (3) all notices and other materials related to such proposed rules and (4) the chronological index hereinafter provided shall constitute the first biennial permanent state register and have a publication date of the first day of January, one thousand nine hundred eighty-three.

(d) All materials filed in the state register after the effective date of this section shall be indexed daily in chronological order of filing with a brief description of the item filed and a columnar cross index to (1) agency and (2) section, article and chapter of the Code to which it relates and by which it is filed in the state register and (3) such other information in the description or cross index as the secretary of state believes will aid a citizen in using the chronological index.

(e) The secretary of state shall cause to be duplicated in such number as shall be required, on white paper with two punches suitable for fastening in two-ring binders, the permanent biennial state register, the chronological index and other materials filed in the register, or any part by agency or section, article or chapter for subscription at a cost including labor, paper and postage, sufficient in his judgment to defray the expense of such duplication. The secretary of state shall also offer, at least at monthly intervals, supplements to the published materials listed above. Any subscription for monthly supplements shall be offered annually and shall include the chronological index and materials related to such agency or agencies, or section, article or chapter of the Code as a person may designate. A person may limit the request to notices only, to notices and rules, or to notices and proposed rules, or any combination thereof.

(f) On and after the first day of January, one thousand nine hundred eighty-three, and every two years thereafter the secretary of state shall offer for purchase succeeding biennial permanent state registers which shall consist of all rules effective on the date of publication selected by the secretary of state, which date shall be at least two years from the last such publication date, and materials filed in the state register relating thereto. The cost of the succeeding biennial permanent state register and for the portion relating to any agency or any section, article or chapter of the Code which may be designated by a person purchasing the same shall be fixed in the same manner specified in subsection (e) of this section.

(g) The secretary of state may omit from any duplication made pursuant to subsections (c) and (f) of this section any rules the duplication of which would be unduly cumbersome, expensive or otherwise inexpedient, if a copy of such rules is made available from the original filing of such rule, at a price not exceeding the cost of duplication, and if the volume from which such rule is omitted includes a notice in that portion of the publication in which the rule would have been located, stating (1) the general subject matter of the omitted rule, (2) each section, article and chapter of this Code to which the omitted rule relates, and (3) the means by which a copy of the omitted rule may be obtained.

(h) All fees and other moneys collected by the secretary of state pursuant to the provisions of this section shall be deposited by him in a separate fund in the state treasury and shall be expended solely for the purposes of this section, unless otherwise provided by appropriation or other action of the legislature.

(i) The secretary of state may propose changes to the procedures outlined in the section above by proposing a legislative rule under the provisions of section nine [§ 29A-3-9], article three, but may promulgate no rules containing such changes unless authorized by the legislature pursuant to article three [§ 29A-3-1 et seq.]. (1982, c. 121.)

### § 29A-2-8. Publication of rules by agencies.

(a) No agency may duplicate copies of its rules for general distribution except in accordance with this section. However, a duly certified copy may be provided by the agency, at the cost of reproduction, if requested and if not presently available from the secretary of state. Whenever an agency desires multiple copies of all or parts of its rules or other materials filed in the state register, it shall purchase the same from the office of the secretary of state. Provided, that when reproduction of the number of copies desired by the agency can be accomplished at a lower cost by the agency, it shall notify the secretary of state in writing of such lower cost and, unless the secretary of state shall within ten days agree to furnish such copies for an equal and lower cost and do so within twenty days thereafter, may proceed at its cost to acquire such copies elsewhere if otherwise authorized to do so by law.

(b) Any published rules may be distributed only to those persons who specifically request a copy of the rules and may not be distributed in any manner to persons who have not requested a copy. The agency may print or otherwise acquire only the number of copies of any rule that it may reasonably anticipate will be requested by members of the general public.



(c) Except as provided in this section, no agency may expend funds to alter the format or presentation of such rules from that provided in the state register (except to adequately fasten and bind the pages) or expend funds to compensate the office of the secretary of state to do so.

(d) Whenever for public convenience an agency deems it appropriate to reproduce one or more rules for general public distribution in some printed form, such as a booklet or other format not provided by copying the state register, the agency shall give written notice to the secretary of state and the legislative auditor of its intention to do so, including therein the anticipated cost and the source or account of appropriations therefor. Such notice shall be recorded in the state register as other notices. After twenty days shall have elapsed, the agency may proceed unless the secretary of state shall have made a finding that such additional publication is unnecessary or unduly expensive. Any such finding shall be served on the agency and the governor and filed in the state register. The governor may, within ten days after receiving such finding, order such publication canceled or order such amendment thereof as is appropriate in his judgment. Any such order of the governor shall be effective until and unless the legislature shall otherwise provide. In the absence of such an order by the governor, the agency may proceed in accord with its original notice of intent. (1982, c. 121.)

### § 29A-2-9. Making orders and records available.

Every agency shall file in the state register or, pursuant to rules adopted in accordance with the provisions of this chapter, make available to public inspection all final orders, decisions and opinions in the adjudication of contested cases except those required for good cause to be held confidential and not cited as precedent. Except as otherwise required by statute, matters of official record shall be made available for public inspection pursuant to rules adopted in accordance with the provisions of this chapter. (1964, c. 1; 1982, c. 121.)

## ARTICLE 3.

### RULE MAKING.

Sec.	Sec.
29A-3-1. Rules to be promulgated only in accordance with this article.	29A-3-11. Submission of legislative rules to the legislative rule-making review committee.
29A-3-2. Limitations on authority to exercise rule-making power.	29A-3-12. Submission of legislative rules to legislature.
29A-3-3. Rules of procedure required.	29A-3-13. Adoption of legislative rules; effective date.
29A-3-4. Filing of proposed procedural rules and interpretive rules.	29A-3-14. Withdrawal or modification of proposed rules.
29A-3-5. Notice of proposed rule making.	29A-3-15. Emergency legislative rules; procedures for promulgation; definition.
29A-3-6. Filing findings and determinations for rules in state register; evidence deemed public record.	29A-3-16. Legislative review of procedural rules, interpretive rules and existing legislative rules.
29A-3-7. Notice of hearings.	29A-3-17. Prior rules.
29A-3-8. Adoption of procedural and interpretive rules.	
29A-3-9. Proposal of legislative rules.	
29A-3-10. Creation of a legislative rule-making review committee.	

**Cross reference.** — Legislative rules, c. 64.  
**Revision of article.** — Acts 1981, c. 121 amended and reenacted this article. With the exception of present § 29A-3-3 (former

§ 29A-3-2), which was transferred to its present location without textual change, the revision was so extensive as to make impossible a detailed comparison with the former article.

### **§ 29A-3-1. Rules to be promulgated only in accordance with this article.**

In addition to other rule-making requirements imposed by law and except to the extent specifically exempted by the provisions of this chapter or other applicable law, every rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by an agency only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article. (1982, c. 121.)

Cited in *West Virginia Mfrs. Ass'n v. West Virginia*, 714 F.2d 308 (4th Cir. 1983).

### **§ 29A-3-2. Limitations on authority to exercise rule-making power.**

(a) Except when, and to the extent, that this chapter or any other provision of law now or hereafter made expressly exempts an agency, or a particular grant of the rule-making power, from the provisions of this article, every grant of rule-making authority to an executive or administrative officer, office or agency, heretofore provided, shall be construed and applied to be effective only:

(1) If heretofore lawfully exercised in accordance with the prior provisions of this chapter and the resulting rule has not been revoked or invalidated by the provisions hereof or by the agency, or

(2) If exercised in accordance with the provisions hereof.

(b) No executive or administrative agency shall be deemed to have power and authority to promulgate a legislative rule without compliance with this article unless: (1) the provision of this Code, heretofore or hereafter enacted, granting such power and authority, expressly exempts its exercise from legislative rule-making review prior to promulgation or (2) the grant of such power and authority is exempted from the application of this chapter by the express provisions of this chapter. To the extent any such grant of power and authority, not so exempt, shall be deemed to exceed the limits and provisions of this article, such power and authority to promulgate legislative rules is hereby revoked. (1982, c. 121.)



**§ 29A-3-3**

## STATE ADMINISTRATIVE PROCEDURES

**§ 29A-3-3. Rules of procedure required.**

In addition to other rule-making requirements imposed by law:

(a) Each agency shall adopt procedural rules governing the formal and informal procedures prescribed or authorized by this chapter. Procedural rules shall include rules of practice before the agency, together with forms and instructions.

(b) To assist interested persons dealing with it, each agency shall, so far as considered practicable, supplement its rules with descriptive statements of its procedures. (1964, c. 1; 1976, c. 117; 1982, c. 121.)

**§ 29A-3-4. Filing of proposed procedural rules and interpretive rules.**

(a) When an agency proposes a procedural rule or an interpretive rule, the agency shall file in the state register a notice of its action, including the text of the rule as proposed.

(b) All proposed rules filed under subsection (a) of this section shall have a fiscal note attached itemizing the cost of implementing the rules as they relate to this State and to persons affected by the rules and regulations. Such fiscal note shall include all information included in a fiscal note for either house of the legislature and a statement of the economic impact of the rule on the State or its residents. The objectives of the rules shall be clearly and separately stated in the fiscal note by the agency issuing the proposed rules. No procedural or interpretive rule shall be void or voidable by virtue of noncompliance with this subsection. (1982, c. 121.)

Cross reference. — State register.  
§ 29A-2-1 et seq.

**§ 29A-3-5. Notice of proposed rule making.**

When an agency proposes to promulgate a rule other than an emergency rule it shall file in the state register a notice of its action, including a text of the rule proposed, a fiscal note as defined in subsection (b) of section four [§ 29A-3-4(b)], and any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. If the agency is considering alternative draft proposals it may include the text thereof.

The notice shall fix a date, time and place for the taking of evidence for any findings and determinations which are a condition precedent to promulgation of the proposed rule and contain a general description of the issues to be decided. If no findings and determinations are required as a condition precedent to promulgation, the notice shall fix a date, time and place for receipt of public comment on such proposed rule.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for public comment on the merits of the rule shall be afforded after such findings and determinations are made. In such

event, notice of the hearing, or of the period for receiving public comment on the proposed rule shall be attached to and filed as a part of the findings and determinations of the agency when filed in the state register.

In any hearing for public comment on the merits of the rule, the agency may limit presentations to written material. The time, date and place fixed in the notice shall constitute the last opportunity to submit any written material relevant to any hearing, all of which may be earlier submitted by filing with the agency.

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

Any citizen or other interested party may appear and be heard at such hearings as are required by this section. (1982, c. 121.)

**Cross reference.** — State register, West Virginia, 542 F. Supp. 1247 (S.D.W. Va. 1982).  
§ 29A-2-1 et seq.  
Applied in West Virginia Mfrs. Ass'n v.

### **§ 29A-3-6. Filing findings and determinations for rules in state register; evidence deemed public record.**

(a) Incident to fixing a date for public comment on a proposed rule, the agency shall promulgate the findings and determinations required as a condition precedent thereto, and state fully and succinctly the reasons therefor and file such findings and determinations in the state register. If the agency amends the proposed rule as a result of the evidence or comment presented pursuant to section five [§ 29A-3-5], such amendment shall be filed with a description of any changes and a statement listing the reasons for the amendment.

(b) The statement of reasons and a transcript of all evidence and public comment received pursuant to notice are public records and shall be carefully preserved by the agency and be open for public inspection and copying for a period of not less than five years from the date of the hearing. (1982, c. 121.)

**Cross reference.** — State register, West Virginia, 542 F. Supp. 1247 (S.D.W. Va. 1982); West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983).  
§ 29A-2-1 et seq.  
Applied in West Virginia Mfrs. Ass'n v.

### **§ 29A-3-7. Notice of hearings.**

Notices of hearings required by sections five and six [§§ 29A-3-5 and 29A-3-6] of this article shall be filed in the state register not less than thirty nor more than sixty days before the date of such hearing or the last day specified therein for receiving written material. Any hearing may be continued from time to time and place to place by the agency which shall have the effect of extending the last day for receipt of evidence or public comment. Notice of such continuance shall be promptly filed thereafter in the state register. (1982, c. 121.)

**§ 29A-3-8**

## STATE ADMINISTRATIVE PROCEDURES

**§29A-3-8. Adoption of procedural and interpretive rules.**

1 A procedural and interpretive rule shall be considered by  
2 the agency for adoption not later than six months after the  
3 close of public comment and a notice of withdrawal or  
4 adoption shall be filed in the state register within that period.  
5 Failure to file such notice shall constitute withdrawal and the  
6 secretary of state shall note such failure in the state register  
7 immediately upon the expiration on the six-month period.

8 A procedural or interpretive rule may be amended by the  
9 agency prior to final adoption without further hearing or  
10 public comment. No such amendment may change the main  
11 purpose of the rule. If the fiscal implications have changed  
12 since the rule was proposed, a new fiscal note shall be attached  
13 to the notice of filing. Upon adoption of the rule (including  
14 any such amendment) the agency shall file the text of the  
15 adopted procedural or interpretive rule with its notice of  
16 adoption in the state register and the same shall be effective  
17 on the date specified in the rule or thirty days after such filing,  
18 whichever is later.

**§ 29A-3-9. Proposal of legislative rules.**

When an agency proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the legislature for permission, to be granted by law, to promulgate such rule as approved by the agency for submission to the legislature or as amended and authorized by the legislature by law.

An agency proposing a legislative rule, other than an emergency rule, shall first file in the state register a notice of its proposal, including the text of the legislative rule and including all materials required in the case of a procedural or interpretive rule. The agency shall then proceed as in the case of a procedural and interpretive rule to the point of, but not including final adoption. In lieu of final adoption, the agency shall approve the rule, including any amendments, for submission to the legislature and file such notice of approval in the state register and with the legislative rule-making review committee.

Such approval of the agency for submission to the legislature shall be deemed to be approval for submission to the legislature only and not deemed to give full force and effect until authority to do so is granted by law. (1982, c. 121.)

Cross reference. — State register,  
§ 29A-2-1 et seq.

**§ 29A-3-10. Creation of a legislative rule-making review committee.**

(a) There is hereby created a joint committee of the legislature, known as the legislative rule-making review committee, to review all legislative rules of the several agencies and such other rules as the committee deems appropriate. The committee shall be composed of six members of the senate, appointed by the president of the senate, and six members of the house of delegates, appointed by the speaker of the house of delegates. In addition, the president of the senate and the speaker of the house of delegates shall be ex officio nonvoting members of the committee and shall designate the cochairmen. Not more than four of the voting members of the committee from each house shall be members of the same political party. The members shall serve until their successors shall have been appointed as heretofore provided. Members of the committee shall receive such compensation and expenses as provided in article two-A [§ 4-2A-1 et seq.], chapter four of this Code. Such expenses and all other expenses, including those incurred in the employment of legal, technical, investigative, clerical, stenographic, advisory and other personnel shall be paid from an appropriation to be made expressly for the legislative rule-making review committee, but if no such appropriation be made, such expenses shall be paid from the appropriation under "Account No. 103 for Joint Expenses," but no expense of any kind whatever payable under said Account No. 103 for joint expenses shall be incurred unless first approved by the joint committee on government and finance. The committee shall meet at any time, both during sessions of the legislature and in the interim.

(b) The committee may adopt such rules of procedure as it considers necessary for the submission, presentation and consideration of rules. (1982, c. 121.)

**§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.**

(a) When an agency finally approves a proposed legislative rule for submission to the legislature, pursuant to the provisions of section nine [§ 29A-3-9] of this article, the agency shall submit to the legislative rule-making review committee at a regular meeting of such committee fifteen copies of (1) the full text of the legislative rule as finally approved by the agency, with new language underlined and with language to be deleted from any existing rule stricken-through but clearly legible; (2) a brief summary of the content of the legislative rule and description of any rule which the agency proposes to amend or repeal; (3) a statement of the circumstances which require the rule; (4) a fiscal note containing all information included in a fiscal note for either house of the legislature and a statement of the economic impact of the rule on the State or its residents; and (5) any other information which the committee may request or which may be required by law.

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

## § 29A-3-11

## STATE ADMINISTRATIVE PROCEDURES

(1) Whether the agency has exceeded the scope of its statutory authority in approving the proposed legislative rule;

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

(3) Whether the proposed legislative rule conflicts with any other provision of this Code or with any other rule adopted by the same or a different agency;

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

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

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

(7) Whether the proposed legislative rule was promulgated **in compliance** with the requirements of this article and with any requirements **imposed by** any other provision of this Code.

(c) After reviewing the legislative rule, the committee shall **recommend that** the legislature:

(1) Authorize the agency to promulgate the legislative rule, or

(2) Authorize the agency to promulgate part of the legislative rule, or

(3) Authorize the agency to promulgate the legislative rule with **certain** amendments, or

(4) Recommend that the rule be withdrawn.

The committee shall file notice of its action in the state register and with the agency proposing the rule: Provided, that when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice **shall** contain a statement of the reasons for such recommendation.

(d) When the committee recommends that a rule be authorized, in whole or in part, by the legislature, the committee shall instruct the office of legislative services to draft a bill authorizing the agency to promulgate all or part of the legislative rule, and incorporating such amendments as the committee desires. If the committee recommends that the rule not be authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together with a recommendation. Any draft bill prepared under this section shall contain a legislative finding that the rule is within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret and **shall** be available for any member to introduce to the legislature. (1982, c. 121.)

**Cross reference.** — State register, § 29A-2-1 et seq.

**W. Va. Law Review.** — Flannery and Poland, Hazardous Waste Management Act —

Closing the Circle, 84 W. Va. L. Rev. 347 (1982).

Cited in West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983).



**§ 29A-3-12. Submission of legislative rules to legislature.**

(a) No later than forty days before the sixtieth day of each regular session of the legislature, the cochairman of the legislative rule-making review committee shall submit to the clerk of the respective houses of the legislature copies of all proposed legislative rules which have been submitted to the committee pursuant to the provisions of section eleven [§ 29A-3-11] of this article and which have not been previously submitted to the legislature for study, together with the recommendations of the committee with respect to such rules, a statement of the reasons for any recommendation that a rule or any part of a rule be amended, and a statement that a bill authorizing the legislative rule has been drafted by legislative services pursuant to section eleven of this article. The cochairman of the committee may also submit such rules at the direction of the committee at any time before or during a special session in which consideration thereof may be appropriate. The committee may withhold from its report any proposed legislative rule which was submitted to the committee fewer than two hundred ten days before the end of a regular session. The clerk of each house shall submit the report to his house at the commencement of the next session.

All bills introduced authorizing the promulgation of a rule may be referred by the speaker of the house of delegates and by the president of the senate to appropriate standing committees of the respective houses for further consideration or the matters may be otherwise dealt with as each house or its rules provide. The legislature may by act authorize the agency to adopt a legislative rule incorporating the entire rule, or may authorize the agency to adopt a rule with any amendments which the legislature shall designate. The clerk of the house originating such act shall forthwith file a copy of any bill enacted in contemplation of this section in the state register and with the agency proposing such rule and the clerk of each house may prepare and file a synopsis of legislative action during any session on any proposed rule submitted to the house during such session for which authority to promulgate was not by law provided during such session.

(b) If the legislature fails during its regular session to act upon all or part of any legislative rule which was submitted to it by the legislative rule-making review committee during such session, no agency may thereafter issue any rule or directive or take other action to implement such rule or part thereof unless and until otherwise authorized to do so.

(c) Nothing herein shall be construed to prevent the legislature by law from authorizing or authorizing and directing an agency to promulgate legislative rules not proposed by the agency or upon which some procedure specified in this chapter is not yet complete.

(d) Whenever the legislature is convened by proclamation of the governor, upon his own initiative or upon application of the members of the legislature, or whenever a regular session of the legislature is extended or convened by the vote or petition of its members, the legislature may by act enacted during such extraordinary or extended session authorize, in whole or in part, any legislative rule whether submitted to the legislative rule-making review committee,



or not, if legislative action on such rule during such session is a lawful order of business.

(e) Whenever a date is required by this section to be computed in relation to the end of a regular session of the legislature, such date shall be computed without regard to any extensions of such session occasioned solely by the proclamation of the governor.

(f) Whenever a date is required to be computed from or is fixed by the first day of a regular session of the legislature, it shall be computed or fixed in the year one thousand nine hundred eighty-four, and each fourth year thereafter without regard to the second Wednesday of January of such years. (1982, c. 121.)

W. Va. Law Review. — Flannery and Poland, Hazardous Waste Management Act — Closing the Circle, 84 W. Va. L. Rev. 347 (1982).

Cited in West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983).

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

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

(b) A legislative rule authorized by the legislature shall become effective thirty days after such filing in the state register, or on the effective date fixed by the authorizing act or if none is fixed by law, such later date not to exceed ninety days, as is fixed by the agency.

(c) The secretary of state shall note in the state register the effective date of an authorized and promulgated legislative rule, and shall file such legislative rule in the state register in lieu of the proposed legislative rule previously filed pursuant to section six [§ 29A-3-6], article three. (1982, c. 121.)

### § 29A-3-14. Withdrawal or modification of proposed rules.

(a) Any legislative rule proposed by an agency may be withdrawn by the agency any time before passage of a law authorizing or authorizing and directing its promulgation, but no such action shall be construed to affect the validity, force or effect of a law enacted authorizing or authorizing and directing the promulgation of an authorized legislative rule or exercising compliance with such law. The agency shall file a notice of any such action in the state register.

(b) At any time before a proposed legislative has been submitted by the legislative rule-making review committee to the legislature pursuant to the provisions of section twelve [§ 29A-3-12] of this article, the agency may modify the proposed rule to meet the objections of the committee. The agency shall file in the state register a notice of its modifying action including a copy of the modified rule, but shall not be required to comply with any provisions of this article requiring opportunity for public comment or taking of evidence with respect to such modification. If a legislative rule has been withdrawn, modified

and then resubmitted to such committee, the rule shall be considered to have been submitted to such committee on the date of such resubmission. (1982, c. 121.)

Cross reference. — State register.  
§ 29A-2-1 et seq.

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

1 (a) Any agency with authority to propose legislative rules  
2 may, without hearing, find that an emergency exists requiring  
3 that emergency rules be promulgated and promulgate the same  
4 in accordance with this section. Such emergency rules, together  
5 with a statement of the facts and circumstances constituting  
6 the emergency, shall be filed in the state register and shall  
7 become effective immediately upon such filing. Such emer-  
8 gency rules may adopt, amend or repeal any legislative rule  
9 but the circumstances constituting the emergency requiring  
10 such adoption, amendment or repeal shall be stated with  
11 particularity and be subject to de novo review by any court  
12 having original jurisdiction of an action challenging their  
13 validity. Fifteen copies of the rules and of the required  
14 statement shall be filed forthwith with the legislative rule-  
15 making review committee.

16 An emergency rule shall be effective for not more than  
17 fifteen months and shall expire earlier if any of the following  
18 occurs:

19 (1) The agency has not previously filed and fails to file a  
20 notice of public hearing on the proposed rule within sixty days  
21 of the date the proposed rule was filed as an emergency rule;  
22 in which case the emergency rule expires on the sixty-first day.

23 (2) The agency has not previously filed and fails to file the  
24 proposed rule with the legislative rule-making review  
25 committee within one hundred eighty days of the date the  
26 proposed rule was filed as an emergency rule; in which case  
27 the emergency rule expires on the one hundred eighty-first day.

28 (3) The Legislature has authorized or directed promulgation  
29 of an authorized legislative rule dealing with substantially the  
30 same subject matter since such emergency rule was first

31 promulgated, and in which case the emergency rule expires on  
32 the date the authorized rule is made effective.

33 (4) The Legislature has, by law, disapproved of such  
34 emergency rule; in which case the emergency rule expires on  
35 the date the law becomes effective.

36 (b) Any amendments to an emergency rule made by the  
37 agency shall be filed in the state register and does not  
38 constitute a new emergency rule for the purpose of acquiring  
39 additional time or avoiding the expiration dates in subdivision  
40 (1), (2), (3) or (4), subsection (a) of this section.

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

45 (d) Emergency legislative rules currently in effect under the  
46 prior provisions of this section may be refiled under the  
47 provisions of this section.

48 (e) The provisions of this section shall not be used to avoid  
49 or evade any provision of this article or any other provisions  
50 of this code, including any provisions for legislative review and  
51 approval of proposed rules. Any emergency rule promulgated  
52 for any such purpose may be contested in a judicial proceeding  
53 before a court of competent jurisdiction.

54 (f) The legislative rule-making review committee may review  
55 any emergency rule to determine (1) whether the agency has  
56 exceeded the scope of its statutory authority in promulgating  
57 the emergency rule; (2) whether there exists an emergency  
58 justifying the promulgation of such rule; and (3) whether the  
59 rule was promulgated in compliance with the requirements and  
60 prohibitions contained in this section. The committee may  
61 recommend to the agency or the Legislature such action as it  
62 may deem proper.

63 (g) For the purposes of this section, an emergency exists  
64 when the promulgation of a rule is necessary for the immediate  
65 preservation of the public peace, health, safety or welfare or  
66 is necessary to comply with a time limitation established by  
67 this code or by a federal statute or regulation or to prevent  
68 substantial harm to the public interest.

**§ 29A-3-16**

## STATE ADMINISTRATIVE PROCEDURES

**§ 29A-3-16. Legislative review of procedural rules, interpretive rules and existing legislative rules.**

The legislative rule-making review committee may review any procedural rules, interpretive rules or existing legislative rules and may make recommendations concerning such rules to the legislature, or to the agency, or to both the legislature and the agency. (1982, c. 121.)

**§ 29A-3-17. Prior rules.**

Any rule lawfully promulgated prior to the effective date of this chapter [May 11, 1982] shall remain in full force and effect until:

(1) Such rule is expressly made ineffective by the provisions of this chapter, or

(2) Such rule should expire by reason of failure to refile the same as provided in section five [§ 29A-2-5] of article two, or expires pursuant to its own terms and provisions lawfully made before the effective date of this section, or

(3) Such rule is repealed by the lawful act of the agency, in conformity with this chapter, or

(4) Such rule is invalidated by an act of the legislature or the force and effect of another law. (1982, c. 121.)

**"Lawfully promulgated".** — The phrase "lawfully promulgated" in this section cannot mean a rule or regulation merely published or approved by an agency, and can only be interpreted to encompass rules or regulations that have met all conditions precedent to the effectiveness prescribed by law. Op. Att'y Gen., Nov. 18, 1982, No. 8.

Section inapplicable to rules proposed

**but not effective prior to effective date of chapter.** — The savings clause of this section does not affect the requirements of § 29A-2-5 concerning the refiling of rules proposed prior to the effective date of that section but not then yet effective, since such proposed rules are not "lawfully promulgated." Op. Att'y Gen., Nov. 18, 1982, No. 8.

**§ 29A-3-16**

## STATE ADMINISTRATIVE PROCEDURES

statutory authority in promulgating the emergency rule; (2) whether there exists an emergency justifying the promulgation of such rule; and (3) whether the rule was promulgated in compliance with the requirements and prohibitions contained in this section. The committee may recommend to the agency or the legislature such action as it may deem proper.

(e) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this Code or by a federal statute or regulation or to prevent substantial harm to the public interest. (1982, c. 121.)

**§ 29A-3-16. Legislative review of procedural rules, interpretive rules and existing legislative rules.**

The legislative rule-making review committee may review any procedural rules, interpretive rules or existing legislative rules and may make recommendations concerning such rules to the legislature, or to the agency, or to both the legislature and the agency. (1982, c. 121.)

**§ 29A-3-17. Prior rules.**

Any rule lawfully promulgated prior to the effective date of this chapter [May 11, 1982] shall remain in full force and effect until:

(1) Such rule is expressly made ineffective by the provisions of this chapter, or

(2) Such rule should expire by reason of failure to refile the same as provided in section five [§ 29A-2-5] of article two, or expires pursuant to its own terms and provisions lawfully made before the effective date of this section, or

(3) Such rule is repealed by the lawful act of the agency, in conformity with this chapter, or

(4) Such rule is invalidated by an act of the legislature or the force and effect of another law. (1982, c. 121.)

"Lawfully promulgated". — The phrase "lawfully promulgated" in this section cannot mean a rule or regulation merely published or approved by an agency, and can only be interpreted to encompass rules or regulations that have met all conditions precedent to the effectiveness prescribed by law. Op. Att'y Gen., Nov. 18, 1982, No. 8.

Section inapplicable to rules proposed

but not effective prior to effective date of chapter. — The savings clause of this section does not affect the requirements of § 29A-2-5 concerning the refiling of rules proposed prior to the effective date of that section but not then yet effective, since such proposed rules are not "lawfully promulgated." Op. Att'y Gen., Nov. 18, 1982, No. 8.

## ARTICLE 4.

DECLARATORY RULINGS AND DECLARATORY  
JUDGMENTS.

Sec.

29A-4-2. Declaratory judgment on validity of  
rule.

## § 29A-4-1. Declaratory rulings by agencies.

Quoted in State ex rel. Callaghan v. W. Va.  
Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va.  
1980).

## § 29A-4-2. Declaratory judgment on validity of rule.

(a) Any person, except the agency promulgating the rule, may have the validity of any rule determined by instituting an action for a declaratory judgment in the circuit court of Kanawha County, West Virginia, when it appears that the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the plaintiff or plaintiffs has or have first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that the rule violates constitutional provisions or exceeds the statutory authority or jurisdiction of the agency or was adopted without compliance with statutory rule-making procedures or is arbitrary or capricious, or that, in the case of an emergency rule adopted pursuant to section fifteen (§ 29A-3-15), article three of this chapter, action under said section fifteen was not justified.

(c) When the invalidity of a rule has been so declared, the agency shall, within thirty days after such declaratory judgment has been entered, acquiesce therein and modify or rescind such invalidated rule in accord with the requirement of such declaratory judgment unless the agency promptly, and in any event within such thirty-day period, notifies the plaintiff or plaintiffs of its intention to apply for an appeal to the supreme court of appeals from such declaratory judgment pursuant to section one (§ 29A-6-1), article six of this chapter. In the event such agency shall thereafter make timely application for such appeal, the acquiescence of the agency in the invalidity of such rule shall not be required until thirty days after timely applications for such appeal have been refused or within thirty days after the appeal has been dismissed or otherwise disposed of in the supreme court of appeals by an affirmance of the judgment invalidating said rule. (1964, c. 1; 1982, c. 121.)

Effect of amendment of 1982. — The amendment, in subsection (b), substituted "an emergency rule" for "a rule" and twice substituted "section fifteen" for "section five."

Quoted in State ex rel. Callaghan v. W. Va.  
Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va.  
1980).



**§ 29A-4-2. Declaratory judgment on validity of rule.**

(a) Any person, except the agency promulgating the rule, may have the validity of any rule determined by instituting an action for a declaratory judgment in the circuit court of Kanawha county, West Virginia, when it appears that the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the plaintiff or plaintiffs has or have first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that the rule violates constitutional provisions or exceeds the statutory authority or jurisdiction of the agency or was adopted without compliance with statutory rule-making procedures or is arbitrary or capricious, or that, in the case of a rule adopted pursuant to section five [§ 29A-3-5], article three of this chapter, action under said section five was not justified.

(c) When the invalidity of a rule has been so declared, the agency shall, within thirty days after such declaratory judgment has been entered, acquiesce therein and modify or rescind such invalidated rule in accord with the requirement of such declaratory judgment unless the agency promptly, and in any event within such thirty-day period, notifies the plaintiff or plaintiffs of its intention to apply for an appeal to the supreme court of appeals from such declaratory judgment pursuant to section one [§ 29A-6-1], article six of this chapter. In the event such agency shall thereafter make timely application for such appeal, the acquiescence of the agency in the invalidity of such rule shall not be required until thirty days after timely applications for such appeal have been refused or within thirty days after the appeal has been dismissed or otherwise disposed of in the supreme court of appeals by an affirmance of the judgment invalidating said rule. (1964, c. 1.)

W. Va. Law Review. — For article, "Rights and Responsibilities in Administrative Rule Making in West Virginia," see 79 W. Va. L. Rev. 513 (1977).

Cited in Appalachian Power Co. v. Environmental Protection Agency, 579 F.2d 846 (4th Cir. 1978).

**ARTICLE 5.****CONTESTED CASES.**

Sec.

29A-5-1. Notice required; hearing; subpoenas; witness fees, etc.; depositions; records.

29A-5-2. Rules of evidence; taking notice of facts; correction of transcript.

Sec.

29A-5-3. Orders or decisions.

29A-5-4. Judicial review of contested cases.

29A-5-5. Exceptions.

W. Va. Law Review. — For survey of administrative procedure for the year 1977, see developments in West Virginia law of 80 W. Va. L. Rev. 113 (1977).

**§ 29A-5-1. Notice required; hearing; subpoenas; witness fees, etc.; depositions; records.**

(a) In any contested case all parties shall be afforded an opportunity for hearing after at least ten days' written notice. The notice shall contain the date, time and place of the hearing and a short and plain statement of the matters asserted. If the agency is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application a more definite and detailed statement shall be furnished. An opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. The required notice must be given as specified in section two [§ 29A-7-2], article seven of this chapter. All of the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence shall also be reported. The agency shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency shall adopt appropriate rules of procedure for hearing in contested cases.

(b) For the purpose of conducting a hearing in any contested case, any agency which now has or may be hereafter expressly granted by statute the power to issue subpoenas or subpoenas duces tecum or any member of the body which comprises such agency may exercise such power in the name of the agency. Any such agency or any member of the body which comprises any such agency may exercise such power in the name of the agency for any party upon request. Under no circumstances shall this chapter be construed as granting the power to issue subpoenas or subpoenas duces tecum to any agency or to any member of the body of any agency which does not now by statute expressly have such power. When such power exists, the provisions of this section shall apply. Every such subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail, but a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. All subpoenas and subpoenas duces tecum shall be issued in the name of the agency, as aforesaid, but any party requesting their issuance must see that they are properly served. Service of subpoenas and subpoenas duces tecum issued at the instance of the agency shall be the responsibility of the agency. Any

person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this State; and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this State. All such fees shall be paid by the agency if the subpoena or subpoena duces tecum were issued, without the request of an interested party, at the instance of the agency. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay such fees. Any such agency may compel the attendance of witnesses and the production of books, records or papers in response to such subpoenas and subpoenas duces tecum. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by such agency or any member of the body which comprises such agency, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein. Witnesses at such hearings shall testify under oath or affirmation.

(c) Evidentiary depositions may be taken and read as in civil actions in the circuit courts of this State.

(d) All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power to: (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three [§ 29A-3-1 et seq.] of this chapter.

(e) Except where otherwise provided by statute, the hearing in any contested case shall be held in the county selected by the agency.

(f) Notwithstanding the provisions of subsection (a) of this section, upon request to the agency from any party to the hearing all reported testimony and evidence at such hearing shall be transcribed, and a copy thereof furnished to

such party at his expense. The agency shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence, and such transcription shall be accomplished with all dispatch. (1964, c. 1.)

**Administrative remedies must be exhausted before courts will act.** — The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act, and this principle applies alike to relief at law and relief in equity. *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

But the rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law. *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

**Even though agency cannot award damages.** — The rule of exhausting administrative remedies before actions in courts are instituted is applicable, even though the administrative agency cannot award damages, if the matter is within the jurisdiction of the agency. *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

**As damages can always be obtained in the courts after the administrative procedures have been followed, if warranted.** *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

**Hence, proceedings in equity for injunctions cannot be maintained where there is an administrative remedy provided by statute which is adequate and will furnish proper remedy.** *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

**A controversy involving the discharge of a member of the department of public safety by its superintendent, when heard originally or on appeal by the board of commissioners under §§ 15-2-20 and former 15-2-21, is a contested case within the meaning of this chapter, and does not include regulations relating solely to the internal management of the department.**

*State ex rel. Gooden v. Bonar*, 155 W. Va. 202, 183 S.E.2d 697 (1971).

Though no appeal is provided by §§ 15-2-20 and former 15-2-21 from the ruling of the board of commissioners, an appeal lies from the final order of the board of commissioners discharging or refusing to discharge a member of the department of public safety from the service to either the circuit court of Kanawha county or the circuit court of the county in which the petitioner resides or does business and from the judgment of the circuit court to the supreme court of appeals as provided by this article and article 6 of this chapter. *State ex rel. Gooden v. Bonar*, 155 W. Va. 202, 183 S.E.2d 697 (1971).

**Demotion of member of department of public safety.** — A member of the department of public safety who, as a disciplinary measure and after a full hearing in accordance with the rules and regulations of the department, is, by the superintendent of the department, demoted from his rank of sergeant to the rank of trooper and transferred to a different post within the State, is not entitled, under the provisions of this chapter, to an appeal to a circuit court from such action of the superintendent. *State ex rel. Burchett v. Taylor*, 150 W. Va. 702, 149 S.E.2d 234 (1966).

The Administrative Procedures Act does not apply in the case of a state trooper demoted for disciplinary reasons, which case does not involve the public, but rather involves a mere disciplinary action relating solely to the internal management of the department. The article in 66 W. Va. L. Rev. 159 (1964), contains the following language at page 169: "The contested case article of the new act does not provide a right to a hearing but it provides the procedure for a hearing where a hearing is required by other provisions of law or by constitutional right." *State ex rel. Burchett v. Taylor*, 150 W. Va. 702, 149 S.E.2d 234 (1966).

Cited in *Jordan v. Roberts*, 246 S.E.2d 259 (W. Va. 1978).

## § 29A-5-2. Rules of evidence; taking notice of facts; correction of transcript.

(a) In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.



Agencies shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any party to any such hearing may vouch the record as to any excluded testimony or other evidence.

(b) All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(c) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(d) Agencies may take notice of judicially cognizable facts. All parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

(e) Upon motion in writing served by any party as notice may be served pursuant to section two [§ 29A-7-2], article seven of this chapter and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the agency shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct that the transcript be corrected and revised in the respects designated by the agency, so as to make it conform to the whole truth. (1964, c. 1.)

### § 29A-5-3. Orders or decisions.

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties shall be given an opportunity to except to such proposed findings and conclusions, and the final order or decision shall include a ruling on each proposed finding. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail. (1964, c. 1.)

**W. Va. Law Review.** — For note discussing requirement that decisions in contested cases be accompanied by findings of fact and conclusions of law, see 80 W. Va. L. Rev. 113 (1977).

**Decisions must contain findings of fact and conclusions of law.** — Decisions of an administrative agency in administrative hearings conducted under the Banking Act and Administrative Procedures Act must contain findings of fact and conclusions of law. *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

**Underlying evidentiary facts must be given.**

— When this section says: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . ." the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of

agency policy from former practice, there should be an explanation of the reasons for such change. *Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts.*, 233 S.E.2d 719 (W. Va. 1977).

The board's simple restatement in its order of the statutory language found in § 31A-4-6 without more does not constitute sufficiently specific findings of fact to comply with the

present section. *Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts.*, 233 S.E.2d 719 (W. Va. 1977).

Applied in *Workman v. Workmen's Comp. Comm'r*, 236 S.E.2d 236 (W. Va. 1977).

Cited in *Gooden v. Board of Appeals of W. Va. Dep't of Pub. Safety*, 234 S.E.2d 893 (W. Va. 1977).

#### § 29A-5-4. Judicial review of contested cases.

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia, or with the judge thereof in vacation, or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

(c) The filing of the petition shall not stay enforcement of the agency order or decision or act as a supersedeas thereto, but the agency may stay such enforcement, and the appellant, at any time after the filing of his petition, may apply to such circuit court for a stay of or supersedeas to such final order or decision. Pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. The expense of preparing such record shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved. Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and the court shall order such record filed.

(e) Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant.



Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this State in accordance with the provisions of section one [§ 29A-6-1], article six of this chapter. (1964, c. 1.)

**W. Va. Law Review.** — As to judicial review under West Virginia Administrative Procedure Act not being applicable to agency actions relating solely to internal management, see 69 W. Va. L. Rev. 53 (1966).

For note, "Administrative Procedure — Judicial Review — Abolition of Extraordinary Writs," see 77 W. Va. L. Rev. 548 (1975).

For survey of W. Va. law on judicial review of administrative decisions for the year 1975-1976, see 78 W. Va. L. Rev. 538 (1976).

**This section does not vitiate the rule which requires the exhaustion of administrative remedies before resorting to the courts.** *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971).

**Chapter applicable to civil service commission.** — This chapter, passed by the legislature in 1964 three years after the Civil Service Act was passed, is applicable to the civil service commission. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

**Two methods of appeal from decisions of civil service commission.** — The sections

pertaining to appeals in both the Administrative Procedures Act and the Civil Service Act deal with the same subject and are not repugnant, and can be said to merely provide for two methods of appeal from decisions of the civil service commission. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

There being no express language in the Administrative Procedures Act that repeals the appeal procedure in the Civil Service Act, and inasmuch as the provisions of both acts are not irreconcilable or repugnant and can be employed as two different methods of review of decisions of the civil service commission, the appeal section of the Civil Service Act (§ 29-6-13) is therefore not repealed by implication by the provisions of this chapter. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972); *Brown v. Civil Serv. Comm'n*, 155 W. Va. 657, 186 S.E.2d 840 (1972).

**Grounds for reversal.** — An order of an administrative body based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is based upon a

## § 29A-5-5

## STATE ADMINISTRATIVE PROCEDURES

mistake of law, will be reversed and set aside by the supreme court of appeals upon review. *Billings v. Civil Serv. Comm'n*, 154 W. Va. 688, 178 S.E.2d 801 (1971).

The supreme court of appeals will not reverse a finding of fact by the civil service commission unless it is contrary to the evidence or is based upon a mistake of law. In other words, the finding must be clearly wrong to warrant this judicial interference. *Billings v. Civil Serv. Comm'n*, 154 W. Va. 688, 178 S.E.2d 801 (1971).

Service of a petition for review upon a member of the board of directors of a

corporation is sufficient under this section to make that corporation a party in proceedings before the circuit court upon a petition for review of agency action, provided that the other requirements of this section have been properly met. *Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts.*, 233 S.E.2d 719 (W. Va. 1977).

Cited in *Consolidation Coal Co. v. Environmental Protection Agency*, 537 F.2d 1236 (4th Cir. 1976); *North v. West Virginia Bd. of Regents*, 233 S.E.2d 411 (W. Va. 1977).

## § 29A-5-5. Exceptions.

The provisions of this article shall not apply to the workmen's compensation fund, the department of employment security, the state tax commissioner, the state road commissioner, the state road commission, and the teachers' retirement board. (1964, c. 1.)

Applied in *Workman v. Workmen's Comp. Comm'r*, 236 S.E.2d 236 (W. Va. 1977).

## ARTICLE 6.

## APPEALS.

Sec.

29A-6-1. Supreme court of appeals.

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W. Va. Law Review. — For survey of administrative procedure for the year 1977, see developments in West Virginia law of 80 W. Va. L. Rev. 113 (1977).

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## § 29A-6-1. Supreme court of appeals.

Any party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the supreme court of appeals of this State, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally. (1964, c. 1.)

**Chapter applicable to civil service commission.** — This chapter, passed by the legislature in 1964 three years after the Civil Service Act was passed, is applicable to the civil service commission. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

**Two methods of appeal from decisions of civil service commission.** — The sections

pertaining to appeals in both the Administrative Procedures Act and the Civil Service Act deal with the same subject and are not repugnant, and can be said to merely provide for two methods of appeal from decisions of the civil service commission. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

There being no express language in the Administrative Procedures Act that repeals the appeal procedure in the Civil Service Act, and inasmuch as the provisions of both acts are not irreconcilable or repugnant and can be employed as two different methods of review of decisions of the civil service commission, the appeal section of the Civil Service Act (§ 29-6-13) is therefore not repealed by implication by the provisions of this chapter. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

**Appeal from order discharging or refusing to discharge member of department of public safety.** — Though no appeal is provided by §§ 15-2-20 and former 15-2-21 from the ruling of

the board of commissioners, an appeal lies from the final order of the board of commissioners discharging or refusing to discharge a member of the department of public safety from the service to either the circuit court of Kanawha county or the circuit court of the county in which the petitioner resides or does business and from the judgment of the circuit court to the supreme court of appeals as provided by this article and article 5 of this chapter. *State ex rel. Gooden v. Bonar*, 155 W. Va. 202, 183 S.E.2d 697 (1971).

Cited in *Citizens Bank v. West Virginia Bd. of Banking & Fin. Insts.*, 233 S.E.2d 719 (W. Va. 1977).

## ARTICLE 7.

### GENERAL PROVISIONS.

Sec.

29A-7-1. Limitations on certain administrative powers.

29A-7-2. Notice generally.

Sec.

29A-7-3. Repeals; subsequent legislation.

29A-7-4. Construction and effect; severability of provisions.

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**W. Va. Law Review.** — For survey of administrative procedure for the year 1977, see developments in West Virginia law of 80 W. Va. L. Rev. 113 (1977).

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#### § 29A-7-1. Limitations on certain administrative powers.

No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. (1964, c. 1.)

#### § 29A-7-2. Notice generally.

Whenever an agency or person is authorized or required to give any notice under this chapter, unless a different method of giving such notice is otherwise expressly permitted or prescribed, such notice shall be given either by personal delivery thereof to the agency or person to be so notified, or by depositing such notice in the United States mail, postage prepaid, in an envelope addressed to such agency or person at the last known address of such agency or person. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the agency, or by affidavit of any person over eighteen years of age, naming the agency or person to which or to whom such notice was given and specifying the time, place and manner of the giving thereof. (1964, c. 1.)

**§ 29A-7-3. Repeals; subsequent legislation.**

All acts or parts of acts which are inconsistent with the provisions of this chapter are hereby repealed to the extent of such inconsistency, but such repeal shall not affect pending proceedings. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so specifically and expressly. (1964, c. 1.)

The repeal of a statute by implication is not favored in law. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

Hence, a general statute, which does not use express terms or employ words which manifest a plain intention so to do, will not repeal a former statute dealing with a particular subject, and the two statutes will operate together unless the conflict between them is so real and irreconcilable as to indicate a clear legislative purpose to repeal the former statute. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

**Section 29-6-13 not repealed by implication.** — There being no express language in the Administrative Procedures Act that repeals the appeal procedure in the Civil Service Act, and inasmuch as the provisions of both acts are not irreconcilable or repugnant and can be employed

as two different methods of review of decisions of the civil service commission, the appeal section of the Civil Service Act (§ 29-6-13) is therefore not repealed by implication by the provisions of this chapter. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

The sections pertaining to appeals in both this chapter and the Civil Service Act deal with the same subject and are not repugnant, and can be said to merely provide for two methods of appeal from decisions of the civil service commission. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

**Chapter applicable to civil service commission.** — This chapter, passed by the legislature in 1964 three years after the Civil Service Act was passed, is applicable to the civil service commission. *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).

**§ 29A-7-4. Construction and effect; severability of provisions.**

Nothing in this chapter shall be held to limit or repeal additional requirements imposed by statute or otherwise recognized by law. No procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of this chapter [July 1, 1964]. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or its application, and to this end the provisions of this chapter are declared to be severable. (1964, c. 1.)