LEGISLATIVE RULE-MAKING
WHERE ARE WE NOW?

QUESTIONS:

1. HOW MANY OF YOU HAVE SEEN AN AGENCY RULE?

2. HOW MANY OF YOU KNOW THE DIFFERENT TYPES OF AGENCY RULES?

3. HOW MANY OF YOU HAVE PREVIOUSLY HAD, CURRENTLY HAVE, OR WILL HAVE RESPONSIBILITY FOR DRAFTING AGENCY RULES?

4. HOW MANY OF YOU HAVE TRACKED AGENCY RULES THROUGH THE RULE-MAKING PROCESS? THE LEGISLATIVE PROCESS?

THE HISTORY:

In 1976, the Legislature amended the State Administrative Procedures Act to create a uniform system for writing and maintaining agency rules. The intent was to maximize public participation in the rule-making process, establish an accessible, central location (Secretary of State) for the rules and to curb past abuses by executive agencies.

The Act created the Legislative Rule-Making Review Committee (LRMRC) as a joint Senate and House committee. The LRMRC was originally given the authority to review all proposed administrative rules, approve or disapprove them, in whole or in part. Any rules the LRMRC failed to act on were deemed approved. Copies of the rules were to be provided to the Legislature no later than 30 days prior to the end of the regular session and referred to standing committees for review. Any rule disapproved by LRMRC received a hearing in another committee. The Legislature was given the authority, but not required, to issue a joint concurrent resolution either sustaining or reversing, in whole or in part, the actions of the LRMRC. Failure of the Legislature to act on the rules was deemed approval of the actions of the LRMRC, unless the rule was to implement a federally subsidized or assisted program. In the case of federal implementation, failure of the Legislature to act was deemed approval of the rule, if it had been disapproved by LRMRC.

Since that time, the rule-making process has evolved and been reinvented, oftentimes at the insistence of the courts. In *Barker v. Manchin*, 167 W.Va. 155 (1981), the Supreme Court held that the LRMRC could no longer approve or disapprove an agency rule without further action by the full Legislature. In the case, the Department of Mines had adopted surface mine safety rules and sent them to the LRMRC for review. The rule was disapproved and no action was taken by the Legislature. The Court held that once the Legislature delegated its rule-making

power to the executive branch, the rules adopted by an agency had the force and effect of law, unless expressly disapproved by a vote of both Houses of the Legislature. The Court ruled that the rule-making process violated the constitutional requirements for separation of powers and ordered that the rule be filed as final. The Court specifically held that the LRMRC could not "veto" rules and that any action on rules would have to be made by the full body of the Legislature. The Court also noted that there were no standards for reviewing rules submitted to the LRMRC.

The Legislature responded to *Barker* by amending article three, chapter 29A of the Code to require the LRMRC to submit bills of authorization for each rule to the full Legislature for consideration. The LRMRC may request that the agency accept modifications to the rule or the Committee may adopt an amendment to the rule. The agency may be also asked to withdraw the rule. The LRMRC is now limited to recommending to the Legislature (1) approval of the rule either as filed by the agency or as modified or amended by the LRMRC; (2) disapproval of the rule; or (3) withdrawal of the rule. The Committee attorneys were required to address seven specific questions for each rule relating to whether the agency exceeded its statutory authority; whether the rule is necessary to accomplish the objectives of the statute; whether the rule is in conformity with the legislature's intent; whether it is in conflict with any Code provision or agency rule; whether it is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it; whether the rule is readily understandable by the general public and whether the rule was promulgated in compliance with the requirements of article three. WVC §29-3-11.

In addition, WVC §29A-3-9 was specifically amended to provide that when an agency proposes a rule, it is applying to the Legislature ". . . for permission, to be granted by law, to promulgate such rule. . . ." and that rules have the force and effect of law only if they have been authorized by an act of the Legislature authorizing their promulgation.

WVC §29A-3-12(b) was also amended to provide that an agency could not implement, in any way, a rule not acted upon by the Legislature. This provision was overruled, however, in the 1995 case *Meadows v. Hechler*, 195 W. Va. 11. WVC §29A-3-12(b) was held to be an unconstitutional violation of the separation of powers doctrine (there may be a pattern here). The Court found that 12(b) created a legislative veto which ". . . impermissibly encroached upon the executive branch's obligation to enforce the law. . . ." The *Meadows* Court held that the Legislature, as a whole or a committee, cannot refuse to act on a rules bill in order to kill it. The rule in question was proposed to meet federal requirements to establish minimum standards for the operation and licensure of personal care homes. The Senate Finance Committee tabled the bill, and the House Judiciary Committee did not consider the bill.

While the Court noted that it had the authority to order the Secretary of State to final file the rule, it declined to do so. The Court gave the Legislature the opportunity at the next regular session to consider the proposed rules in accordance with proper procedures.

In response to the *Meadows* decision, the Legislature amended 12(b) to preclude an agency from enforcing only those proposed rules which were expressly disapproved by the Legislature. A new subdivision (e) was added to authorize the Legislature to disapprove rules.

THE PRESENT:

The Senate and the House Judiciary Committees have the responsibility to make the final review of all of the rules bills and to prepare committee substitutes, which combine all of the bills for each executive department and all of the bills for the miscellaneous boards and agencies not assigned to an executive department. These "bundled" bills are then reported to the full Legislature for consideration. The committees of first and second reference are required by the *Barker* and *Meadows* cases to report all rules bills out of committee. The bills can be reported out with a recommendation that they pass as introduced, as amended or that the rule not be authorized.

When the rules come to the Judiciary Committees, some people become confused by the process. I will let you in on the secret. There are between 100 and 125 bills of authorization for rules each year. Those bills will be introduced within the first 20 days of the session. The bill does not provide you with any of the substance of the rule, nor does it have the rule attached to the bill. (See attached) The committee of first reference has the official copy of the rule from LRMRC attached to the introduced bill of authorization. When the rule is being discussed, some committees provide copies of the rule and the bill to the members while some do not. All of the rules are available in the Secretary of State's office and on the SOS website. A rules bill is just like any other bill, in that the bill and the rule may be amended. Except, as you know, they cannot be killed in committee. Something must be reported out of the Judiciary Committees.

There are generally nine bundled bills. They are divided as equally as possible into bills that will come out as a Senate or House bill. A staff attorneys will select a bill which relates to a specific department to use as the bundle bill for that department, i.e. SB236 for bundle 2, Department of Administration. It's a number they like, can remember, their birthday or it just strikes their fancy. The individual bills lose their identity, when they become part of the bundle. As a very helpful service to the public, the rules are tracked in the State Register through each step of the process.

In the Senate, each rules bill is presented to the Judiciary Committee individually. This makes for some interesting agendas, when we are trying to get the "bundled" Committee Substitute out by the 47th day (last day to get bills out of house of origin). In the House, the entire bundle is presented at one time, whether there is one rule in the bundle or 30. In either case, you may wonder why your bill has not been reported out or if it will ever appear on an agenda. Be patient, your day will come and so will your bill.

THE FUTURE:

Environmental rules proposed by the DEP are required by federal law to be submitted to the EPA for further review and approval before they become final rules. Federal law also requires supporting documentation for any changes to a current rule. In the case of *Ohio Valley Environmental Coalition v. Horinko*, Civil Action No. 3:02-0059, Judge Goodwin vacated the EPA's approval of West Virginia's antidegradation implementation rule and remanded the case to the EPA for further proceedings. The law requires the EPA to have a rational basis for approving DEP rules and any amendments thereto. In general, every aspect of environmental regulation is science-based, whether it is water quality standards, air emissions or mining and reclamation standards. In order to amend a scientific requirement and have it approved by EPA and the courts, there must be sufficient evidence on the record to support the amendment.

The Legislature is a political creature not a scientific peer review group. Neither is it a full-time legislative body with unlimited resources like Congress. It is not designed nor equipped to establish scientific evidence to support amendments to science-based standards. The rule amendments overturned by Judge Goodwin were the result of political compromise and negotiation, not scientific study. Does that mean that the Legislature can never amend a DEP rule unless there is "sufficient scientific" information on the record? What is "sufficient scientific" information? How would a committee amass such information in a 60 day session?

We know that bills do not always pass the Legislature. What happens to the rules when a rules bundle does not pass or is not properly enrolled? Some would argue that the Legislature failed to act, therefore, the rules go into effect as filed by the agency. Some would argue that failure of a bill is an inherent part of the legislative process and that as long as individual members have the right as members of a deliberative body to exercise their discretion when they vote, failure is always possible. Therefore, the Legislature met the requirements of *Meadows* to " . . . act as a legislature, within the confines of the enactment procedures mandated by our constitution . . . ." Under these circumstances, would the rules be brought back to the Legislature the following year? Or perhaps the bill could be taken up in extended or extraordinary session?

What will be the next challenge facing rule-making?

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General Counsel
Senate Judiciary Committee
357-7815
December 3, 2009

64 CSR 17

Senate Bill No. 398

(By Senators Minard, Fanning, Prezioso, Unger, Boley and Facemyer)

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[Introduced January 25, 2008; referred to the Committee on Health and Human Resources; then to the Committee on Finance; and then to the Committee on the Judiciary.]

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A BILL to amend and reenact article 5, chapter 64 of the Code of West Virginia, 1931, as amended, relating to authorizing the Department of Health and Human Resources to promulgate a legislative rule relating to food establishments.

Be it enacted by the Legislature of West Virginia:

That article 5, chapter 64 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 5. AUTHORIZATION FOR DEPARTMENT OF HEALTH AND HUMAN RESOURCES TO PROMULGATE LEGISLATIVE RULES.

§64-5-1. Department of Health and Human Resources.

The legislative rule filed in the state register on the twenty-seventh day of July, two thousand seven, authorized under the authority of section four, article one, chapter sixteen, of this code, modified by the Department of Health and Human Resources to meet the objections of the legislative rule-making review committee and refiled in the state register on the seventh day of December, two thousand seven, relating to the Department of Health and Human Resources (food establishments, 64 CSR 17), is authorized.

NOTE: The purpose of this bill is to authorize the Department of Health and Human Resources to promulgate a legislative rule relating to Food Establishments.

This section is new; therefore, strike-throughs and underscoring have been omitted.