AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 29, 1991

1:00 - 4:00 p.m.

Senate Finance Committee Room 451

1. Approval of Minutes - Meeting July 16, 1991

2. Review of Legislative Rules:

    a. Ethics Commission, WV, Dept. of Admr. - Private Gain, Series 6

    b. Ethics Commission, WV, Dept. of Admr. - Gifts, Series 7

    c. Ethics Commission, WV, Dept. of Admr. - Interest in Public Contracts, Series 8

    d. Ethics Commission, WV, Dept. of Admr. - Voting, Series 9

    e. Ethics Commission, WV, Dept. of Admr. - Contributions, Series 10

    f. Ethics Commission, Wv, Dept. of Admr. - Employment, Series 11

    g. Ethics Commission, WV, Dept. of Admr. - Lobbying, Series 12

3. Other business:

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 30, 1991

9:00 a.m. - Noon

Senate Finance Committee Room 451

1. **Review of Legislative Rules:**

    a. **Tourism and Parks, Division of - Rules Governing Public Use of WV State Parks, State Forests, and State Hunting and Fishing Areas under the Division of Tourism and Parks**

    b. **Tax, Dept. of - Bingo Rules and Regulations**

    c. **Natural Resources, Division of - Special Motorboating Regulations**

    d. **Natural Resources, Division of - Boating Regulations**

    e. **Department of Administration - Reporting of State Assets by Financial Institutions**

    f. **Board of Miner Training, Education and Certification - Rules and Regulations Governing the Standards for Certification of Blasters for Surface Coal Mines and Surface Areas of Underground Coal Mines**

    g. **Medicine, Board of - Continuing Education for Physicians and Podiatrists**

    h. **Department of Agriculture - Licensing of Pesticide Businesses**

    i. **Department of Agriculture - West Virginia Plant Pest Act Regulations**

    j. **Department of Agriculture - Certified Pesticide Applicator Rules and Regulations**

    k. **Department of Agriculture - Regulations to Govern the Aerial Application of Herbicides to Rights of Way**

2. **Other business:**

AUGUST 29

TENTATIVE AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 29, 1991

1:00 - 4:00 p.m.

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1. Approval of Minutes - Meeting July 16, 1991

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    e. Ethics Commission, WV, Dept. of Admr. - Contributions, Series 10

    f. Ethics Commission, Wv, Dept. of Admr. - Employment, Series 11

    g. Ethics Commission, WV, Dept. of Admr. - Lobbying, Series 12

3. Other business:

SPECIAL MEETING

Thursday, August 29, 1991

1:00 - 4:00 p.m. Legislative Rule-Making Review Committee (Code §29A-3-10)

Keith Burdette ex officio nonvoting member	Robert "Chuck" Chambers, ex officio nonvoting member
Senate	House
Wooton, Chairman	Grubb, Chairman
Chafin	Burk
Manchin, J.	Faircloth
Tomblin	Roop
Wiedebusch (absent)	Love
Boley	Gallagher

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

The minutes of the July 16, 1991, meeting were approved.

John Barrett, representing Common Cause and Karen Lukens, representing League of Women Voters addressed the Committee regarding all of the rules proposed by the Ethics Commission.

Rick Alker, Executive Director of the Ethics Commission, answered questions from the Committee regarding the rule proposed by the Ethics Commission, Lobbying.

Mr. Wooton moved that Section 2.2 of the proposed rule be modified so that the exemptions listed in the proposed rule conform to the statute and that the proposed rule also be modified so that a citizen who lobbies the the Legislature a limited number of times need not register with the Commission. He asked that the Commission make recommendations regarding the number of times a citizen may lobby before registration is required. At Mr. Wooton's request, Michael McThomas, Committee Associate Counsel reviewed his memo regarding conflicts between statutes and administrative rules. After discussion of the memo, Mr Wooton asked to withdraw the second portion of his motion. The motion was adopted.

Mr. Love requested that the Commission draft a bill for the 1992 Session of the Legislature to correct problems in the law regarding lobbying.

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

Debra Graham, Committee Counsel, reviewed her abstract on the rule proposed by the Ethics Commission, Employment, and stated that the Commission had agreed to technical modifications. She also told the Committee that the Commission wished to substantially modify Section 4 of the proposed rule. Mr. Alker explained the proposed modifications to Section 4 and answered questions from the Committee. John Montgomery, an employee of the Department of Tax and Revenue, addressed the Committee regarding the proposed rule and answered questions from the Committee.

Mr. Gallagher moved that the proposed rule be modified by deleting Section 4.1 relating to moonlighting. The motion was adopted.

Mr. Wooton moved that the proposed rule lie over until the Committee's September meeting and that Mr. Montgomery submit suggested modifications to the proposed rule. The motion was adopted.

Ms. Graham reviewed the rule proposed by the Ethics Commission, Contributions, and stated that the Commission had agreed to technical modifications.

Mr. Gallagher moved that Section 4 of the proposed rule be modified to make it clear that a Commission member may vote on a ballot issue and that Section 3.1 of the proposed rule be modified by adding the words "or committee" after the word "candidate". The motion was adopted.

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

Ms. Graham reviewed her abstract on the rule proposed by the Ethics Commission, Voting, and told the Committee that the Commission had agreed to technical modifications. Mr. Alker answered questions from the Committee.

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

Ms. Graham explained the rule proposed by the Ethics Commission, Interest in Public Contracts, and stated that the Commission had agreed to technical modifications.

Mr Tomblin moved that Section 2.1 of the proposed rule be modified deleting the words "or has influence over". The motion was adopted.

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

Mr. Wooton moved that the rule proposed by the Ethics Commission, Gifts, lie over until the Committee's September meeting in order to allow the Commission to reconsider the provisions of the proposed rule regarding honorariums, athletic tickets and nominal gifts. The motion was adopted.

Mr. Alker distributed handouts in response to questions from the Committee at its July meeting regarding the rule proposed by the Ethics Commission, Private Gain.

Mr. Love moved to modify Section 3.1 of the proposed rule to allow public officials and public employees to use bonus points and other promotional items for their benefit if the points and other items are also offered to the general public. Mr. Alker stated that the Commission would not agree to the proposed modification.

Mr. Gallagher moved that the proposed rule lie over until the Committee's September meeting and that the Commission be requested to to provide information regarding the tax consequences of accepting bonus points which then become the property of the State. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: August 29, 1991

TIME: 1:00 - 4:00 p.m.

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Grubb, David, Co-Chair	✓			
Burk, Robert W., Jr.	✓			
Faircloth, Larry V.	✓			
Brian A. Gallagher	✓			
Love, Sam	✓			
Roop, Jack	✓			
Burdette, Keith, President				
Wooton, William, Co-Chair	✓			
Chafin, Truman H.	✓			
Manchin, Joe, III	✓			
Tomblin, Earl Ray	✓			
Boley, Donna	✓			
Wiedebusch, Larry				
TOTAL				

RE: _____

_____

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_____

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Legislative Rule-Making DATE: August 29, 1991

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly		—	X – Employment Rules
John Montgomery	Nitro, WV		
Karen Lukens	1127 Montrose Dr. So. Chas. WV	League of Women Voters	X
John Barrett	PO Box 3263 Charleston 25332	Common Cause	X
Robert Lamont	1207 Quarrier St Chas	Ethics Commission	
R.M. ALKER	"	"	

LS-C-66-1a

Distributed
8/29/91

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

August 29, 1991

Richard M. Alker, Executive Director
West Virginia Ethics Commission
1207 Quarrier Street
Charleston, West Virginia 25301

Re: **TAXABILITY OF HOTEL BONUS POINTS**
Legal Log No. 91-213

Dear Mr. Alker:

This letter is in response to your request for a ruling on whether bonus points accumulated by the State's public officials each night they patronize a hotel while on official state business at state expense, and used at a later time for free lodging and other benefits at hotels while not on official state business, are subject to West Virginia Consumers Sales and Service Tax or personal income tax.

The first issue is whether bonus points are subject to sales tax. The sales tax laws do not expressly deal with the question of bonus points. This issue does not arise when public officials obtain lodging at government expense if the charges are billed directly to the relevant governmental agency, due to the general exemption provided by W. Va. Code § 11-15-9(c) for sales of property or services to the State.

West Virginia Consumers Sales and Service Tax (sales tax) is imposed upon sales of tangible personal property and certain selected services. See W. Va. Code § 11-15-3. All transactions are presumed taxable unless specifically excepted under W. Va. Code § 11-15-8 or exempted under W. Va. Code § 11-15-9, elsewhere in the Code, or by federal law. See W. Va. Code § 11-15-6.

There are no exceptions or exemptions from sales tax for lodging and other benefits at hotels. Thus, according to the Consumers Sales and Service and Use Tax Regulations, stays at hotels, motels, tourist homes and rooming houses are subject to sales tax, unless the lessee of the room or apartment occupies the premise in excess of thirty consecutive days. See, 110 C.S.R. 15, § 38, "Hotels, Motels, Tourist Homes and Rooming Houses".

According to Section 38.1 of those regulations,

> 38.1 Persons engaged in renting rooms in hotels, motels, tourist homes and rooming houses on a daily basis shall compute the consumers sales and service tax upon the daily charge. The monetary consideration subject to the consumers sales and service tax shall not include any local hotel or motel tax. See "monetary consideration" in Section 2 of these regulations. (Emphasis added)

The sales tax regulations define "monetary consideration" as follows:

> "Monetary consideration" means the actual cost to the purchaser of tangible personal property or a service purchased after deduction for the value of any item traded-in as part of the consideration paid for the tangible personal property or service purchased. Monetary consideration shall not include the amount of federal, state or local tax simultaneously imposed upon the tangible personal property or service purchased. (Emphasis added.) 110 C.S.R., 15 § 2.43.

Inasmuch as bonus points are items of value traded in as part of the consideration paid for lodging or other benefits, the value of such bonus points should be deducted from the usual sales price to determine the actual cost to the purchaser, which is the amount subject to the tax. For purposes of the sales tax, how or by whom bonus points are earned would not have any bearing on how sales tax is computed.

Bonus points are a special type of cash discount. As stated in the regulations,

> [A]ny cash discount allowed at the time of delivery which establishes the final selling price for the article at that time shall not be included in arriving at the monetary consideration or purchase price subject to the tax. Discounts which are allowed after delivery or upon conditions or events happening at some future time, such as a certain percentage discount being allowed if paid within a specified period, are not deductible in determining the tax base for the consumers sales and service tax or use tax liability. 110 C.S.R. 15 § 3.4.3. (Emphasis added.)

Thus, for sales tax purposes, the monetary consideration or purchase price upon which sales tax is imposed is equal to the actual cost of the hotel room or other taxable benefits, not

including the amount deducted for bonus points earned in advance of their application to the purchase price. Whether the bonus points are used by public officials or others would have no relevance to how sales tax is computed. Similarly, whether the bonus points are earned while on official business would not affect how sales tax is computed under the sales tax laws.

The second issue is whether bonus points are subject to West Virginia's personal income tax. West Virginia imposes its personal income tax on the "taxable income" of every individual, estate and trust. See W. Va. Code § 11-21-3.

West Virginia's personal income tax system, W. Va. Code § 11-21-1 et seq., is based upon the federal income tax laws in many respects. In particular, West Virginia adjusted gross income (WVAGI) is the federal adjusted gross income (federal AGI) unless increased or decreased by one or more of the modifications provided in W. Va. Code § 11-21-12, "West Virginia adjusted gross income of resident individual," or W. Va. Code § 11-21-32, "West Virginia adjusted gross income of a nonresident individual." Because West Virginia has no such statutory modifications pertaining to the bonus points at issue, bonus points would be treated the same under West Virginia tax law as under federal tax law. That is, those bonus points are included in WVAGI if included in federal AGI, and are excluded from WVAGI if excluded from federal AGI.

Thus, the question of how West Virginia's tax laws treat bonus points depends on how the federal income tax laws treat them. Because we have been unable to locate any published information concerning how bonus points are treated by the federal income tax laws, we have requested information from the IRS' Taxpayer Services, which does not expect to be able to provide an answer before September 10th of this year.

The Tax Division does not generally interpret federal tax laws, but a brief discussion may be in order. Bonus points may not be considered taxable income for the following reasons. The federal definition of gross income does not expressly include (nor exclude) bonus points or anything similar to bonus points. Although bonus points may be said to be "earned", they are not like earned income from wages, salaries, commissions, fringe benefits and similar items included in gross income. Bonus points are "earned" only in the sense that the consumer earns a discount for buying the products and services of a particular hotel in volume. Nor are bonus points similar to items of unearned income such as interest, rent, royalties, dividends and the like.

As noted above in the sales tax context, bonus points are a type of discount from a regularly stated sales price. As such, bonus points are not really income at all, but rather money not spent in a sales transaction. Savings on purchases in other contexts, such as the use of coupons to save money on consumer goods, are not considered income. It would be very burdensome for

consumers to have to keep track of all instances when they saved money on purchases, in order to pay income tax on such savings, and such a requirement would also be difficult for a taxing agency to administer and enforce.

On the other hand, the definition of "gross income" in Title 26 of the Code of Federal Regulations is sufficiently broad to interpret it as including bonus points. As defined in § 1.61.2 of those regulations:

> Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, other property, as well as in cash.

It can be seen from the all-inclusive language of this definition of gross income that bonus points, if considered to be income, could be considered to be gross income. If so, bonus points would also be considered in arriving at federal AGI and WVAGI, and ultimately in taxable income. Since "gross income" is not defined in the West Virginia Code or regulations thereto (110 C.S.R. 21), the above federal definition of gross income is incorporated by reference into West Virginia Personal Income Tax law pursuant to W. Va. Code § 11-21-9, "Meaning of terms."

In conclusion, it is the position of the Department of Tax and Revenue that bonus points accumulated by state officials while on official business would not be taxable under the sales tax laws. But whether or not bonus points would be subject to the State's personal income laws depends on federal law, which is unclear at this time. If we were to hazard an opinion, we would expect the IRS to determine that bonus points are not subject to federal income tax. However, it should be emphasized that this is an issue that only the IRS can authoritatively resolve.

We hope this letter will be of assistance to you. When we receive the requested information from the IRS, we will forward it to you. If you have any further questions about this matter, please let us know.

Very truly yours,

Richard E. Boyle, Jr.
Director, Legal Division

LD/kl/ks

Distributed
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MAY A PUBLIC SERVANT USE BONUS POINTS FROM "OFFICIAL TRAVEL"?

	Paid by State		Paid by Individual Reimbursed by State		On State Business, Paymt form not specified		Comments
	yes	no	yes	no	yes	no	
Alabama			x				1/2 price airline ticket for spouse
California			x				Air ticket from Bonus points
Illinois						x	State uses FF points
Iowa						x	FF or other airline perks
Louisiana		x	x				Frequent Flyer points
Maryland						x	Private benefits including FF points
Massachusetts						x	Car rental points
Michigan							Practice not standardized
Missouri					x		
Nebraska						x	
New York							No State standard, subject to collective bargaining
Oregon						x	Free ticket for bumped flight
Pennsylvania						x	
West Virginia		x		x			

§301-1.6 Instructions/guidelines for travelers.

"(b) *Promotional materials received in connection with official travel from common carriers, rental car companies, or other commercial source.* ... All promotional materials (e.g., bonus flights, reduced-fare coupons, cash, merchandise, gifts, and credits toward future free or reduced costs of services or goods) received by employees in connection with official travel or incident to the purchase of a ticket for official travel, or other services such as car rentals, are due the Government and may not be retained by the employee. When an employee receives promotional material from any commercial source incident to official travel, the employee shall accept the material on behalf of the Federal Government and relinquish it to an appropriately designated agency official."

"(f) *Frequent traveler programs.* Frequent traveler benefits earned in connection with official travel, such as mileage credits, points, etc., may be used only for official travel. Employees may not retain and use such benefits for personal travel. Since the Comptroller General has ruled that a frequent traveler benefit is the property of the Government if any part of it is earned through official travel, employees should maintain separate frequent traveler accounts for official and personal travel."

Dist'd
8/29/91

LEAGUE OF WOMEN VOTERS OF WEST VIRGINIA

1127 MONTROSE DRIVE • SOUTH CHARLESTON, WV 25303 • TELEPHONE 304-744-8787

The League of Women Voters of West Virginia supports a strong ethics law to govern the conduct of public officials and employees. This law should minimize opportunities for using public office for private gain.

We believe that the establishment of an Ethics Commission to administer the law is an effective way to control public corruption.

Since the West Virginia Governmental Ethics Act was adopted in 1989, the Ethics Commission has made a serious, good faith effort to interpret the law and assure compliance. The legislative rules under discussion today are representative of that effort. The recommendations appear to be a reasonable approach which remains true to the original intent of the legislature.

The League urges your committee to accept the recommendations of the Commission and to adopt strict ethical standards. Arguments which appear to be trivial and self serving undermine public confidence in the integrity of the legislature.

The ethics law was adopted in response to public outcry against years of corruption in West Virginia politics. The fact that we are all here today is a sign that no one wants to go back to the "old days."

The League strongly opposes any attempts to weaken the ethics law or to relax its standards. By demonstrating positive leadership you can reaffirm the trust that the voters of West Virginia have placed in you.

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 30, 1991

9:00 a.m. - Noon

Senate Finance Committee Room 451

1. Review of Legislative Rules:

   a. Tourism and Parks, Division of - Rules Governing Public Use of WV State Parks, State Forests, and State Hunting and Fishing Areas under the Division of Tourism and Parks

   b. Tax, Dept. of - Bingo Rules and Regulations

   c. Natural Resources, Division of - Special Motorboating Regulations

   d. Natural Resources, Division of - Boating Regulations

   e. Department of Administration - Reporting of State Assets by Financial Institutions

   f. Board of Miner Training, Education and Certification - Rules and Regulations Governing the Standards for Certification of Blasters for Surface Coal Mines and Surface Areas of Underground Coal Mines

   g. Medicine, Board of - Continuing Education for Physicians and Podiatrists

   h. Department of Agriculture - Licensing of Pesticide Businesses

   i. Department of Agriculture - West Virginia Plant Pest Act Regulations

   j. Department of Agriculture - Certified Pesticide Applicator Rules and Regulations

   k. Department of Agriculture - Regulations to Govern the Aerial Application of Herbicides to Rights of Way

   l. Department of Agriculture - Assessment of Civil Penalties and Procedures for Consent Agreements or Negotiated Settlement

2. Other business:

TENTATIVE AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 30, 1991

9:00 a.m. - Noon

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    c. Natural Resources, Division of - Special Motorboating Regulations

    d. Natural Resources, Division of - Boating Regulations

    e. Department of Administration - Reporting of State Assets by Financial Institutions

    f. Board of Miner Training, Education and Certification - Rules and Regulations Governing the Standards for Certification of Blasters for Surface Coal Mines and Surface Areas of Underground Coal Mines

    g. Medicine, Board of - Continuing Education for Physicians and Podiatrists

    h. Department of Agriculture - Licensing of Pesticide Businesses

    i. Department of Agriculture - West Virginia Plant Pest Act Regulations

    j. Department of Agriculture - Certified Pesticide Applicator Rules and Regulations

    k. Department of Agriculture - Regulations to Govern the Aerial Application of Herbicides to Rights of Way

2. Other business:

SPECIAL MEETING

Friday, August 30, 1991

9:00 - 11:00 a.m. Legislative Rule-Making Review Committee (Code §29A-3-10)

Keith Burdette ex officio nonvoting member	Robert "Chuck" Chambers, ex officio nonvoting member
Senate	House
Wooton, Chairman	Grubb, Chairman
Chafin (absent)	Burk
Manchin, J.	Faircloth
Tomblin	Roop
Wiedebusch (absent)	Love
Boley	Gallagher

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

Michael McThomas, Committee Associate Counsel, distributed two memos he had prepared on Procedural Rules of Order and Conflict of Statute and Administrative Rule.

Debra Graham, Committee Counsel, told members of the Committee that the Division of Tourism and Parks requested that the rule proposed by the Division, Rules Governing Public Use of WV State Parks, State Forests, and State Hunting and Fishing Areas under the Division of Tourism and Parks, be laid over until the Committee's next meeting due to the unavailability of a representative of the Division. Mr. Grubb stated, that without objection, the proposed rule would lie over until the Committee's September meeting.

Mr. McThomas explained the current posture of the rule proposed by the Department of Tax, Bingo Rules and Regulations. John Montgomery, of the Legal Division of the Tax Department, told the Committee that the Commissioner is not willing to modify the proposed rule as requested by Mr. Love at the Committee's July meeting and explained the Commissioner's rationale for not modifying the proposed rule.

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

Ms. Graham explained the rule proposed by the Division of Natural Resources, Special Motorboating Regulations, and stated that the Division had agreed to several technical modifications. Major Bill Daniel, of the Division of Natural Resources, further explained the proposed rule and answered questions from the Committee.

Mr. Love moved that the proposed rule be modified to require the city of St. Marys to post No Wake signs. The motion was adopted.

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

Ms. Graham reviewed her abstract on the rule proposed by the Division of Natural Resources, Boating Regulations, and told the Committee that the Division had agreed to technical modifications. Major Daniel requested that the Committee lay the proposed rule over so that the Division would have time to review comments received from Leff Moore. Major Daniel answered questions from the Committee.

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

Mr. McThomas reviewed the rule proposed by the Department of Administration, Reporting of State Assets by Financial Institutions and stated that the Department had agreed to technical modifications. Diana Stout, General Counsel for the Department, answered questions from the Committee.

Mr. Tomblin moved that the proposed rule be modified to require that financial institutions report on a semi-annual basis and to require the Department to send a copy of the information received to the Legislative Auditor. The motion was adopted.

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

Mr. McThomas reviewed his abstract on the rule proposed by the Board of Miner Training, Education and Certification, Rules and Regulations Governing the Standards for Certification of Blasters for Surface Coal Mines and Surface Areas of Underground Coal Mines, and stated that the Board had agreed to technical modifications. Mr. McThomas answered questions from the Committee. Roger Hall, Division of Energy, answered questions from the Committee.

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

Ms. Graham reviewed her abstract on the rule proposed by the Board of Medicine, Continuing Education for Physicians and Podiatrists, and told the Committee that the Board had agree to technical modifications. Deborah Roedecker, Counsel to the Board, answered questions from the Committee.

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

Ms. Graham explained the rule proposed by the Department of Agriculture, Licensing of Pesticide Businesses, and stated that the Department had agreed to technical modifications. Bob Frame of the Department of Agriculture, addressed the Committee regarding the proposed rule and answered questions from the Committee.

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

Ms. Graham reviewed her abstract on the rule proposed by the Department of Agriculture, West Virginia Plant Pest Act Regulations, and stated that the Department had agreed to technical modifications.

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

Ms. Graham reviewed her abstract on the rule proposed by the Department of Agriculture, Certified Pesticide Applicator Rules and Regulations, and stated that the Department had agreed to technical modifications. Mr. Frame answered questions from the Committee.

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

Ms. Graham explained the rule proposed by the Department of Agriculture, Regulations to Govern the Aerial Application of Herbicides to Rights of Way, and told the Committee that the Department had agreed to technical modifications.

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

Ms. Graham reviewed her abstract on the rule proposed by the Department of Agriculture, Assessment of Civil Penalties and Procedures for Consent Agreements or Negotiated Settlement, and stated that the Department had agreed to technical modifications.

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

The meeting was adjourned.

AUGUST 30

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: August 30, 1991

TIME: 9:00 am - Noon

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Grubb, David, Co-Chair	✓			
Burk, Robert W., Jr.	✓			
Faircloth, Larry V.	✓			
Brian A. Gallagher	✓			
Love, Sam	✓			
Roop, Jack	✓			
Burdette, Keith, President				
Wooton, William, Co-Chair	✓			
Chafin, Truman H.				
Manchin, Joe, III	✓			
Tomblin, Earl Ray	✓			
Boley, Donna	✓			
Wiedebusch, Larry				
TOTAL				

RE: _____

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Legislative Rule-Making Review Comm DATE: August 30, 1991

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
John Montgomery	Charleston	Tax & Revenue	As Needed
Deborah Lewis Rodecker	Charleston	Bd. of Medicine	if needed
Roger T. Hall	Chas	DOE	
Leff Moore	Nitro	WV Recreational Vehicle Assn	X-Boating rules
Barbara Smith	Charleston	Agriculture	if requested
Diana Hart	Chas	Administration	"
Jeff Martin	"	"	"
Robert Frame	Charleston	Agriculture	if requested.
MAJOR Bill Daniel	Chas	DNR LAW	& Boating Regs

LS-C-66-1a

M E M O R A N D U M

TO: William R. Wooton, Chairman

FROM: Michael P. McThomas, Counsel

SUBJECT: Conflict of Statute and Administrative Rule

DATE: August 15, 1991

Whether a Subsequently Enacted Administrative Rule
Takes Precedence Over a Prior Enacted Statute
Where There Is An Irreconcilable Conflict

The issue presented has yet to be resolved by the West Virginia Supreme Court of Appeals utilizing the argument that a legislative rule authorized by the full Legislature is equal to a statute. There are two basic theories which can be argued and each theory leads to the opposite conclusion. West Virginia's legislative review of administrative regulations is unique because the statutory scheme is unlike any other state. The basic premise in West Virginia is that no agency is authorized to promulgate a legislative rule without first obtaining authority to do so from the Legislature. The conclusion that a subsequently authorized legislative rule would control if in conflict with the statute granting authority is partially due to West Virginia Code §64-1-1, which provides, in part:

> The Legislature further declares that all rules now or hereafter authorized under articles two through nine of this chapter are within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret.

W.Va. Code §64-1-1 (1991)

This provision of the statute was first enacted in 1989 and to date the Court has not had the occasion to interpret its meaning or effect in light of general administrative law principles. This language clearly states that whatever is contained in the legislative rule is the intent of the Legislature, and because of the enactment of a bill authorizing the rule by the full Legislature, the rule should take precedence over all prior acts of the Legislature.

However, utilizing the rules of statutory construction, statutes are afforded a higher plane and greater weight than legislative rules. As noted in Sutherland Statutory Construction:

> Because the power of any other agency of government than its central legislative body to make regulations depends upon statutory authorization, administrative regulations rank below statutes in the order of precedence. In any event of a conflict between the provisions of a statute and an administrative regulation, the former prevails. (Footnote omitted.)

Vol. 2, Sutherland **Stat Const** §36.06 (4th Ed)

As a general rule, the statute takes precedence over a legislative rule because the authority to promulgate the rule is derived from the statute itself. The Legislature may delegate some of its legislative authority, however, in doing so, the Legislature does not divest itself of its constitutional power.

Despite the basic rules of statutory construction, an understanding of general administrative law and of the current

statute is necessary to appreciate the difficulty in reaching a decisive conclusion.

It is also helpful to recall the historical developments and present status of West Virginia law. The effect of the current statutory design on the judicial interpretation of regulations is illustrated in the decisions of the Court before and after the case of State ex rel. Barker v. Manchin, 279 S.E.2d 622 (1981). In the Barker case, the Court declared that the statute then in effect was unconstitutional because it was violative of the constitutional provision on the separation of powers. The caselaw indicates that the 1982 statute correcting the constitutional deficiency has had no effect on the Court's usage of the propositions of general administrative law in deciding cases. However, it is important to note that the key provision of W.Va. Code §64-1-1 enunciating legislative intent has not been addressed by the Court in a controversy between a prior enacted statute and a subsequently enacted legislative rule.

GENERAL ADMINISTRATIVE LAW

The United States Congress and every other state grants executive agencies both "legislative" and "judicial" authority to implement the law. The reasoning is one of practical consideration. Without permitting executive agencies to exercise "judicial" power in the form of administrative hearings, findings of fact and conclusions of law, the courts would be overburdened

with cases substantially increasing the current caseload. So long as an appeal process permits access to the courts and judicial review, the constitutional doctrine of separation of powers is not offended.

Similarly, the Legislature may grant "legislative" authority for executive agencies to promulgate regulations without violating constitutional provisions. As a practical matter the delegation of legislative authority is necessary because the Legislature does not have the time or resources to delve into the details of complex subject matter which is better left to the experts in the employ of the executive. However, the Legislature always retains its constitutional power and does not divest that power to the agency. The Legislature therefore retains its power to enact subsequent legislation to repeal any inconsistent or conflicting administrative regulation or to institute a change in policy. As noted in Sutherland:

> The Legislature always retains power to revoke or repeal, by direct legislative action, any of the regulations of an agency issued under statutory authority, whether or not there was any antecedent requirement that the regulation be laid before the Legislature for its approval. (Citation omitted)

Vol. 2, Sutherland Stat Const §36.03 (4th Ed)

It necessarily follows that the agency is limited in its ability to issue regulations based upon the Legislature's delegation of authority to the agency. An administrative agency may promulgate regulations if the Legislature grants the agency the authority to do so, but the ability of agency to issue regulations is

dependent upon the statutory authorization. (Courts will make some exception, however, which is deemed to be implicit authorization)

Accordingly, the legislative characteristics of a lawfully promulgated regulation result in the regulation having the force and effect of law. Usually, the authorizing statute or a general statute will specifically reiterate the effect of administrative regulations declaring that regulations have the force and effect of law. If a general statute expresses the status of regulations, the agency is still limited by the authorizing statute and any rule which is inconsistent with the Constitution or is beyond the scope of the authority of the agency is not accorded the legal effect. Vol. 1A, Sutherland **Stat Const** §31.02, 31.04 (4th Ed)

Generally, a regulation is without the force of law if it is in conflict with the statute because the force and effect of the regulation is derived from the statute. 2 Am Jur 2d **Administrative Law** §289. A regulation will not be afforded the force of law if the regulation is inconsistent with the authorizing statute. Regulations not in harmony with the plain language of the underlying statute are invalid. United States v. Coates, 526 F Supp 248 (E.D. Cal. 1981). Regulations are considered an extension of the statute and are generally regarded as legislative enactments, and therefore have the same effect as part of the original statute. 2 Am Jur 2d **Administrative Law** §295. But, a regulation must be consistent with and conform to

the statute in order for the regulation to be considered an integral part of the statute.

Furthermore, the derivative nature of the authority to issue regulations results in administrative regulations ranking below statutes in the hierarchy of law. Therefore, a statute will take precedence over a regulation if there is a conflict between a statute and a regulation.

> Since the [Legislature] is the source of an administrative agency's power, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation. (Citation omitted)

Vol. 1A, Sutherland **Stat Const** §31.02 (4th Ed)

This is the case regardless of the time of enactment of either. Generally, administrative regulations in conflict with the constitution or statutes are generally declared to be null or void. 2 Am Jur 2d **Administrative Law** §300, **citing,** Harris v. Alcoholic Beverage Control Appeals Board, 228 Cal. App. 2d 1.

An exception to this general rule is where the agency promulgating the regulation derives its power from the Constitution of the state. The rules and regulations of an administrative agency which derives its power from the Constitution and not from the Legislature are paramount and the regulation may supersede the statute where there is a conflict. 2 Am Jur 2d **Administrative Law** §302.

Another aberration to the general rule is where the Legislature adopts the recommendation prepared by an administrative agency as the law of the state.

> [W]here by legislative enactment a code commission is created with power to compile and codify statutes of the state then in force, and the legislature thereafter adopts the code prepared by the commission as the law of the state, such code and all laws therein contained thereafter become the law of the state, although the commission may have inserted sections containing new matter, or sections theretofore repealed, contrary to the provisions of the act creating the commission and authorizing the compilation.

2 Am Jur 2d **Administrative Law** §41, **citing,** Atchley v. Board of Barber Examiners, 257 P.2d 302.

The principle set forth in this passage can be analogized to West Virginia's statutory scheme of enactment by the full Legislature of a bill of authorization to promulgate legislative rules.

In some instances, a court may find that a subsequently promulgated regulation has the effect of repealing a prior enacted statute. The Legislature may grant an agency the power to suspend or repeal prior legislative enactments, however, the legislative grant of authority must be specific and expressly state the intent to repeal a statute. Another example of the repealing effect is where there is constitutional authority for an administrative body to act. If the administrative body derives its power from the Constitution, the subsequent enactment of the administrative agency may work as a repeal of a prior inconsistent statute. Vol. 1A, Sutherland **Stat Const** §23.19 (4th Ed).

Generally, courts are unwilling to hold that a statute is repealed by the enactment of an administrative regulation. The

Legislature must intend this result as expressed in the statute granting the agency's authority and only in such a case should the administrative regulations be given a repealing effect. **Id.** However, the Legislature always retains the power to repeal an administrative regulation by the enactment of subsequent legislation.

The nature of the constitutional powers of the Legislature enable the Legislature to control the course of administrative law by providing general or specific grants of authority to promulgate regulations. The Constitution, as the highest body of law, is the controlling grantor of power and in this regard the Legislature is unable to divest itself of the powers granted to it by the Constitution.

WEST VIRGINIA ADMINISTRATIVE LAW

In general, the West Virginia Supreme Court of Appeals has adopted the principles outlined above as illustrated in the caselaw. It would be too voluminous to expound upon every administrative law decision of the Court, especially in light of the statutory change in 1982. However, to lay the groundwork for the analysis of the current statute, it is prudent to reiterate some of the basic law regarding administrative rules.

The basic law bearing on West Virginia administrative law is the Constitution. Unlike the United States Constitution, the

West Virginia Constitution specifically states the separation of powers doctrine:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

W.Va. Const. Art. V, § 1.

Of course, the Court could not be too strict in its interpretation of this passage because of the practical realities of government. Although this provision does possess great weight, the Court recognized that the responsibilities of the separate branches of government overlap and it was a matter of efficiency and effectiveness of government that the Legislature be permitted to delegate some of its legislative duties to the executive branch. In this regard the Court has approved of the issuance of regulations pursuant to a grant of authority to do so by the Legislature and has increasingly upheld the delegation of legislative authority as not violating the constitutional doctrine of the separation of powers. Neely, Administrative Law in West Virginia, Chapter 2, 1982.

A recent case which turns not only on the separation of powers doctrine, but also is based upon the proposition that the rules promulgated by a constitutional agency take precedence over statutory enactments is State ex rel. Quelch v. Daugherty, 306 S.E.2d 233 (W.Va. 1983). In Quelch, candidates for admission to

the State Bar of West Virginia sought a mandamus to require the Board of Law Examiners to admit them without taking the examination. The Court held that the statute repealing the diploma privilege for candidates for admission to the Bar conflicted with the rules of the Supreme Court granting the privilege and the statute was therefore unconstitutional. As the Court noted in the Syllabus by the Court:

> The constitutional separation of powers, W.Va. Const. art. V, § 1, prohibits the legislature from regulating admission to practice and discipline of lawyers in contravention of rules of this Court. W. Va. Const. art. VIII, § 1.

306 S.E.2d at 233.

Because the West Virginia Constitution, Article VIII, § 1 states that the judicial power of the State is vested solely in a Supreme Court of Appeals, the Court determined that it had the inherent power to define, supervise, regulate and control the practice of law. W.Va. State Bar v. Early, 109 S.E.2d 420 (1959); Committee on Legal Ethics of W.Va. State Bar v. Graziani, 200 S.E.2d 353 (1973), **cert. denied,** 416 U.S. 995, 94 S.Ct. 2410 (1974). The Legislature does not possess the constitutional authority to interfere with the constitutional authority of the judiciary. Therefore, the rules of the Court are superior to a legislative enactment which invades the province of the Court. This illustrates the proposition that the regulations of a body which derives its authority from the Constitution will supersede statutes of the Legislature, regardless of the time of enactment.

The key case in West Virginia addressing the separation of powers, the delegation of legislative authority and legislative oversight of legislative rules is State ex rel. Barker v. Manchin, 279 S.E.2d 622 (1981). The Court found that the statutory procedure of legislative review was invalid which precipitated a statutory change which is now the current law. The statute which the Court struck down as violative of the separation of powers provision permitted the Legislative Rule-Making Review Committee (LRMRC) to veto rules and regulations otherwise validly promulgated by administrative agencies.

Legislative review of administrative regulations is not by itself repugnant to states' constitutions. It is only the mechanism of review which may be unconstitutional. Of the forty-one states with some form of legislative review of administrative rules, three have no formal review, six have executive branch review, ten have both executive and legislative review, thirteen permit the veto of rules by statute, fifteen permit the veto rule by resolution and four states grant veto authority through constitutional provisions. National Conference of State Legislatures, Legislative Review of Administrative Rules and Regulations, (1990).

The law in effect at the time of Barker gave the LRMRC the authority to disapprove rules even though committee hearings were required to be held on those disapproved rules. The rules were forwarded to appropriate standing committees for their review. The Legislature had the discretion by concurrent resolution

either to sustain or reverse the action of LRMRC. W.Va. Code §29A-3-12 (1980). Whereas a joint or concurrent resolution may bind the members of the legislative body, resolutions are not statutes and do not have the force and effect of law. Barker at 633. In addition, inaction by the full Legislature validated the LRMRC's disapproval of rules and regulation. The Court stated that the statute implied that the action of LRMRC was a recommendation to the Legislature and review by the full Legislature was not mandatory.

Because the action of the full Legislature was not mandatory, the Court stated that the review process invaded the veto powers of the Governor and offended the constitutional requirement of the separation of powers. 279 S.E.2d at 632. The Court further stated that the Legislature must utilize the formal enactment process to enact law reasoning that to give legal force to informal actions of the Legislature would be to exceed the constitutional authority of the Legislature. Id.

The Court did recognize the power of the Legislature to check the powers of the other branches of government, but in order to do so, the Legislature must legislate. The Court stated:

> While the Legislature has the power to void or to amend administrative rules and regulations, when it exercises that power it must act as a Legislature through its collective wisdom and will, within the confines of the enactment procedure mandated by our constitution.

Id. at 633.

The Court accepted the premise that the Legislature may reject or amend legislative rules provided that the action to accomplish such review is ultimately reserved to the full Legislature acting as a body and not a committee comprised of a percentage of the membership. Hence, the current statutory scheme requires affirmative action by the full Legislature in the approval of authorization to promulgate legislative rules. Whether a subsequently authorized legislative rule takes precedence over a prior enacted statute can not be concluded from this case alone. It is essential to review the basic propositions of administrative law as interpreted in West Virginia both before and after the Barker decision.

The key issues bearing upon an ultimate conclusion include the delegation of legislative authority, the status of administrative regulations having the force and effect of law, the requirement that regulations conform to the statute, and the necessity that the regulations are within the intent of the Legislature.

Clearly, the Court has endorsed the premise that it is appropriate for the Legislature to delegate part of its responsibility to the executive to implement the policy and purpose of statutory enactments. The Court stated in State ex rel. Callaghan v. W.Va. Civil Service Commission, 273 S.E.2d 72 (1980), that:

> Legislative power may be constitutionally delegated to an administrative agency to promulgate rules and regulations necessary and proper for

> the enforcement of a statute. W.Va. Const. art. VI, §1; art. V, § 1.

Id. at 72, Syl pt 3.

The Court reiterated its holding that the Legislature may lawfully delegate its power to the executive in Ney v. State Workmen's Compensation Commissioner, 297 S.E.2d 212 (1982):

> It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions...

Id. at 213, citing, Syllabus Point 3, Rowe v. Department of Corrections, 292 S.E.2d 650 (W.Va. 1982)

The delegation of authority by the Legislature also was recognized in the Barker decision, but the principle of delegation was not adversely effected by the declaration that the statutory scheme of legislative review was invalid.

Provided the agency acts within the law, the regulations which it promulgates are accorded the force and effect of law. The Legislature adopted the common law on this subject in stating rules and regulations promulgated by the executive "have the force and effect of law because of their legislative character..." W.Va. Code §29A-1-1. The principle is also embodied in the definition of legislative rule which states, in part, that a "[l]egislative rule includes every rule which, when promulgated after or pursuant to authorization of the Legislature, has (1) the force of law,..." W.Va. Code §29A-1-2(d). However, under the current statute, the principle of the force and effect of law does not bear upon the rule until the

Legislature grants the agency the authority to promulgate the rule. W.Va. Code §29A-3-9.

Nonetheless, the principle is embodied in the caselaw. In Reed v. Hansbarger, 314 S.E.2d 616 (1984), the Court issued a writ of mandamus compelling the Director of the Department of Health to enforce the licensing, inspection, penalty and other provisions of the rules adopted by the State Board of Health governing the construction and operation of food service establishments with respect to the food service facilities in the correctional institutions in West Virginia. In this case, Huttonsville Correctional Center was operating a food service without a valid permit. The Court held that the regulation of the State Board of Health had the force of law:

> As we stated in State ex rel. Barker v. Manchin, 279 S.E.2d 622, 631 (W.Va. 1981): "Once the executive officer or agency has made and adopted valid rules and regulations pursuant to the grant of the legislative powers, they take on the force of statutory law." See also Syl. pt. 1, Rinehart v. Woodford Flying Service, Inc. 122 W.Va. 392, 9 S.E.2d 521 (1940)

Reed v. Hansbarger, 314 S.E.2d at 620.

The date of the Rinehart case cited in this passage, 1940, exemplifies the duration of the proposition that a validly promulgated rule has the force of law. The Court elaborated upon the extent of the legal effect of a regulation in a recent case.

In 1988, the Court noted in dicta that in order to have the force of law, the rules promulgated by the agency must reflect the intention of the Legislature.

> Rules and Regulations of the West Virginia Human Rights Commission must faithfully reflect the intention of the legislature when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the Commission's Rules and Regulations that it has in the statute.

Ranger Fuel Corp. v. Human Rights Commission, 376 S.E.2d 154, 160 (1988); Syl. pt. 4 at 156.

The Court also restricted the application of the doctrine of the force and effect of law for administrative regulation by pronouncing that "when rules and regulations attempt to alter a perfectly clear legislative definition, they are invalid." **Id.** at 158.

The rule at issue in Ranger Fuel was later declared to be a legislative rule by the Court and not an interpretive rule as filed by the Human Rights Commission. Chico Dairy Co. v. Human Rights Commission, 382 S.E.2d 75 (1989). As a legislative rule it had not been submitted to the LRMRC as required by statute and the Court held the rule to be invalid. See also Fourco Glass Co. v. Human Rights Commission, 383 S.E.2d 64 (1989).

The Court also held in Chico that the rule was invalid because the rule clearly conflicted with the legislative intent by expressly enlarging upon the substantive rights created by the statute. **Id.** at 84. The statute involved in Chico adopted one of three parts of a federal definition for "handicapped person" where the rule included all three parts. Hence, the definition contained in the statute was more restrictive than the federal definition. The rule attempted to expand the statutory

definition. Other cases support the proposition that the rule or regulation must be consistent with the statute and the legislative intent.

In Rowe v. W.Va. Department of Corrections, 292 S.E.2d 650 (1982), the Court invalidated a rule of the Board of Pardon and Parole which required that the Commissioner of the Department of Corrections approve a prisoner's parole program in order for the inmate to obtain parole. The statute gave the Board the sole discretion to grant or deny parole. However, the Board's regulation requiring approval of the parolee's release plan as a condition subsequent to obtaining release on parole, had in effect, delegated the ultimate decision of release to the Commissioner of Corrections. Id. at 650, Syl. pt. 2. The Court stated that "an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority." Id. at 653. Furthermore, the Court stated that "an administrative agency's rules and regulations must also be reasonable and conform to the laws enacted by the Legislature." Id. at 653, citing, Anderson & Anderson Contractors, Inc. v. Latimer, 257 S.E.2d 878, 881 (W.Va. 1979)

Quoting Rowe and citing Anderson, the Court struck down a section of the Workmen's Compensation Fund Rules and Regulations because it found that the rule placed unreasonable limits on the reimbursement for medical travel expenses in contravention of the purposes of the statute. Ney v. State Workmen's Compensation Commissioner, 297 S.E.2d 212 (1982). The statute in Ney

authorized the payment of transportation expenses necessarily incurred in obtaining medical treatment, but the regulation provided for reimbursement of travel expenses for obtaining medical treatment only if the distance traveled exceeded 25 miles.

Although decided before Barker, Callaghan v. W.Va. Civil Service Commission, 273 S.E.2d 72 (1980), incorporates the principles demonstrated so far. The Court never reached the question of whether a subsequently promulgated rule will supersede a prior statute where there is a irreconcilable conflict, but the Court did uphold a broad grant of authority to the Civil Service Commission to promulgate rules. The statute granted the following authority:

> The commission and the director may include in the rules provided for in this article such provisions as are necessary to conform the regulations and standards of any federal agency governing the receipt and use of federal grants-in-aid by any state agency, anything in this article to the contrary notwithstanding.

Id. at 74, quoting, W.Va. Code §29-6-10.

Here, the Legislature granted the Commission the authority to promulgate rules which were necessary to meet federal requirements anticipating that the regulation may be in contravention of the statute. The Court upheld this provision as a constitutional delegation of authority. The Division of Natural Resources (DNR) argued that the statute delineating appellate jurisdiction limited the Civil Service Commission in the exercise of its powers. The Commission's rule extended its

jurisdiction to include appeals based on merit principles while the statute contemplated appeals only upon the completion of stated events. The appellate jurisdiction was required by federal regulation for eligibility for grants-in-aid. The Court applied the following standard in determining the validity of the rule:

> Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.

Id. at 73, Syl. pt. 4.

In this case, however, there was no glaring conflict, nor was there a strict view of the rule-making authority. The statute granting the authority was very broad and the Court read the federal and state statutes and rules in pari materia.

The Court did not reach the issue of an inconsistency between the statute and the rule. The Court found that DNR did not have standing to present the issue of forfeiture of office because the Court said that there was no indication that the Commission had or intended to employ the provision. The Court suggested that DNR bring a declaratory judgment action and limited its ruling to the issue of jurisdiction. The grounds in which the Court upheld the rule in Callaghan were based upon the broad authority granted to the Commission - "anything in this article to the contrary notwithstanding." Normally, a grant of authority to promulgate legislative rule is limited and Callaghan is unique in this

respect. In general, however, the Legislature has restricted the executive's ability to promulgate legislative rules.

The current statutory scheme in West Virginia is such that the agency is applying for authority to promulgate the rule and the agency has no authority, except for emergency rules, to promulgate the rule without legislative authorization. West Virginia Code §29A-3-9 states:

> 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.
>
> Such approval of the rule by 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.

These provisions make it clear that the authority of an agency to promulgate rules is limited by legislative approval. The implication, however, is that the rules are law because they must be authorized by law. When reviewing the statutory scheme, the LRMRC is charged with preparing bills and the Speaker of the House of Delegates and the President of the Senate may refer the bills to appropriate standing committees of their respective houses for further consideration. W.Va. Code §29A-3-12(a). The bills of authorization may also be handled as the joint rules or the rules of the respective houses provide. Id.

If the full Legislature fails to act on a bill of authorization during the 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." W.Va. Code §29A-3-12(b). If an agency where to subsequently implement a policy disapproved by the Legislature, the policy or rule which the agency is attempting to enforce would probably be declared invalid by a court.

If the Legislature approves a rule and passes a bill of authorization for that rule, the agency is authorized to implement that rule. By the passage of the legislation, the Legislature declares that the rule is within the intent of the Legislature. West Virginia Code §64-1-1 provides, in part:

> The Legislature further declares that all rules now or hereafter authorized under articles two through nine of this chapter are within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret.

This provision infers that even if the rule conflicts with the statute, the rule embodies the Legislature's intent. Therefore, the implication is that the rule should control if there is a conflict. The West Virginia Supreme Court of Appeals has not addressed this provision as yet and how much weight it will carry with the Court is unknown.

The Legislature has also provided the standards to use in reaching a declaratory judgment on the validity of a rule.

> (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,..

W.Va. Code §29A-4-2.

In analyzing a rule using these standards, it becomes apparent that the Legislature is checking itself in that even if it authorizes a rule in conflict with the statute, a court may declare the rule invalid if the rules exceeds the authority or jurisdiction of the agency. Although Callaghan, supra, quotes this code section, the Court never reached the issue on an alleged inconsistency between the statute and the rule preferring to hold that the DNR had no standing to present the issue and suggested the DNR initiate a declaratory judgment action.

In a pre-Barker case, the Court found a Board of Pharmacy rule invalid because it contained a "contorted" definition of sale and required that the rule stay within the confines of and be consistent with the intent of the Legislature. Ye Olde Apothecary v. McClellan, 253 S.E.2d 545,546 (1979). In another pre-Barker case, Burruss v. Hardesty, 297 S.E.2d 836 (1982) (Interpreting 1974 tax law), the Court held that the regulation was incorrect as a matter of law because the rule had to be interpreted in a particular way not only to be consistent with the statute but also to be consistent with the practical realities of calculating the Business and Occupation Tax on timber severing. The rule as promulgated was found to be beyond the authority of the statute.

A post-Barker case, Wheeling Barber College v. Roush, 321 S.E.2d 694 (1984), provides no guidance after the enactment of the current statute because the Court stated that mandamus will not lie under the facts and the proper avenue to attack a memorandum issued by the Board of Barbers and Beauticians was by declaratory judgment. As such, the Court did not reach the issue of whether there was a conflict between the statute and the memorandum which was considered by the Court to be a invalidly promulgated rule. In two other post-Barker cases, the Court continued to apply basic administrative law despite the change in statute. In Ney, supra, the Court struck down the regulation because it was found contrary to the statute, and in Rowe, supra, the Court found that the rule of the Parole Board was beyond its authority.

In light of the cases, it appears that the Court has not addressed the unique nature of the rule-making process as having any bearing upon the status of legislative rules. Although the full Legislature acts as a body in authorizing the legislative rules and, essentially, legislating as suggested by the Court in Barker, the caselaw does not exhibit a change in the fundamental principles of administrative law.

Another code provision which tangentially limits an agency's rule-making power is W.Va. Code §29A-7-4, which states that nothing in chapter twenty-nine-a "shall be held to limit or repeal additional requirements imposed by statute or otherwise recognized by law." Although it may appear that this provision

conflicts with the declaration of legislative intent in W.Va. Code §64-1-1, this provision addresses the promulgation process and not the content of legislative rules. The intent of this provision is to clarify that the enactment of chapter twenty-nine-a is not to supersede any existing requirements of law. However, a judicial determination of legislative intent and the application of these provisions are unclear because they have yet to be interpreted by the courts.

CONCLUSION

It can be argued that the authorization in the form of a bill, acted upon by the full Legislature, is equal to statutory law. If the final promulgation of the rule is viewed as statute, or equal to statute, then it necessarily follows that a subsequently approved though conflicting legislative rule would supersede a prior inconsistent statute. The basis for this conclusion, however, is rooted in the assumption that a bill of authorization and consideration of the rule by the full Legislature carries as much weight as a statute. In the alternative, it can be argued that the bill which is passed by the Legislature is only a bill of authorization and does not rise to the level of the statute because the language of the rule is not contained in the official acts. To date, this specific question has not been argued in the above format before the West Virginia Supreme Court of Appeals and, consequently, a decisive

conclusion would be premature. However, based upon the caselaw, it appears that the Court will continue to consider legislative rules as inferior to statutes regardless of the fact that the full Legislature authorized the promulgation of the rule. If this is the case, a subsequently authorized rule will not take precedence over a prior inconsistent statute.

M E M O R A N D U M

TO: William R. Wooton, Chairman

FROM: Michael P. McThomas, Counsel

SUBJECT: Procedural Rules of Order

DATE: July 18, 1991

In response to your request, this memorandum addresses the available actions the Legislative Rule-Making Committee may take on a legislative rule as well as the status of a legislative rule if the Committee rejects a motion to approve a rule.

The statute requiring the Legislative Rule-Making Review Committee to recommend rules to the Legislature takes precedence over the rules of parliamentary procedure. By enacting the statute, the Legislature has spoken and dictated to the Committee its duties in reviewing legislative rules. In this regard, the statute provides the alternatives the Committee may take when considering a rule. The Committee is limited in its ability to act on legislative rules by the statutory authority.

The Legislative Rule-Making Review Committee has the following options in recommending a rule to the full Legislature:

(a) Authorize the agency to promulgate the legislative rule,

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

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

(d) Recommend that the rule be withdrawn.

W. Va. Code §29A-3-11 (c). Modifications to the rules are incorporated within the above options if the agency agrees with the Committee's suggested amendments and modifies the rule to meet the objections of the Committee. West Virginia Code §29A-3-14 permits an agency to modify the proposed rule to meet the objections of the Committee any time before the proposed rule has been submitted to the Legislature.

As a practical matter, modifications are the preferred method of making changes to the rules because of the complications of dealing with amendments. Rules with amendments require that the amendments be included in the bill authorizing the promulgation of the rule, whereas modifications are considered part of the rule and not the bill. Hence, the actual results of Committee action are expanded by the increase in selections through the use of modifications. The Committee may submit the following actions on legislative rules to the Legislature:

(a) Authorize the agency to promulgate the legislative rule as filed with the Committee,

(b) Authorize the agency to promulgate the legislative rule with modifications,

(c) Authorize the agency to promulgate part of the legislative as filed,

(d) Authorize the agency to promulgate part of the legislative with modifications,

(e) Authorize the agency to promulgate the legislative rule with certain amendments,

(f) Authorize the agency to promulgate the legislative rule with modifications and with certain amendments,

(g) Authorize the agency to promulgate part of the legislative rule with modifications and with certain amendments, or

(h) Recommend that the rule be withdrawn.

As a side note, the agency is not required to withdraw a rule upon the recommendation of the Committee. The statute states that an agency "may" withdraw a rule any time before passage of a law authorizing its promulgation. W.Va. Code §29A-3-14(a). The Committee does not have statutory authority to reject a rule or require withdrawal. The Legislature can reject a rule by failing to include the rule in any of its bills of authorization (Omnibus Rules Bill). If the Legislature fails to act upon all or part of any legislative rule as submitted by the Committee during the Session, the agency is prohibited from issuing any rule or directive or taking other action to implement the rule unless authorized to do so by the Legislature. W.Va. Code §29A-3-13(b).

Furthermore, the Committee must take affirmative action in order to submit a particular rule to the Legislature. Where a member of the Committee moves to approve a rule, and authorize the agency to promulgate the rule, and that motion is rejected, the status of the rule is similar to unfinished business. The statute contemplates that the Committee make a recommendation and

then describes what recommendations are appropriate. Rejection of a motion to approve does not constitute adoption of a motion to recommend withdrawal of the rule and rejection of a motion to recommend withdrawal does not constitute adoption of a motion to approve. Each motion is separate and distinct because the motions are not coequal and not equivalent and alternative motions are available.

Jefferson's Manual, §485, Equivalent Questions in General, contains the following rule:

> Where questions are perfectly equivalent, so that the negative of the one amounts to the affirmative of the other, and leaves no other alternative, the decision of the one concludes necessarily the other. 4 Grey, 157.

Jefferson's Manual, §485, pg. 246, 247. The manual comments on the passage from Grey that "the negative of striking out amounts to the affirmative of agreeing; and therefore to put a question on agreeing after that on striking out, would be to put the same question in effect twice over." Id.

In other words, if the motion to reject is rejected it constitutes approval of the measure only if 1) the questions are coequal and equivalent and 2) no other alternative question exists. Then the reason for only voting once is that to vote again would be duplicative. On the other hand, if the questions are not equivalent or an alternative exists, the rejection of a

motion to reject does not necessarily conclude the question and further action of the body is necessary to complete action on the measure.

Joint Rule 3 of the Joint Rules of the Senate and House of Delegates exemplifies this principle. Joint Rule 3 specifically states that a motion to recede having failed shall be equivalent to the adoption of a motion to insist and a motion to insist being decided in the negative, shall be equivalent to the adoption of a motion to recede. It must be emphasized, however, that the rule is explicit to the particular questions of action on the disagreement of a measure between the Senate and the House of Delegates. The parliamentary rule is limited to certain instances and the rule can not be utilized if the motions fail to meet the standards required of an Equivalent Question.

The options available to the Committee in recommending legislative rules to the Legislature are neither coequal nor equivalent. Three of the statutory options permit the Committee to approve the rule in various forms. The other option is a recommendation that the agency withdraw the proposed rule. The Committee does not have the authority to reject a proposed rule. So a failure of a motion to approve does not constitute adoption of motion to recommend withdrawal because the motions do not coincide, the motions are not equivalent, and alternative motions may be considered. More importantly, the failure of a motion to

recommend withdrawal can not be deemed adoption of a motion to approve because there are at least three statutorily recognized forms of approval to which there is certainly no equivalent; and therefore, three alternatives. In the event of a failure of a motion to approve or recommend withdrawal, the Committee leaves the rule in an undetermined posture which amounts to unfinished business because the actions of the Committee are incomplete. Therefore, another motion is required.

Upon the rejection of a motion to approve, the Committee should either adopt a motion to recommend withdrawal of the rule or adopt a motion to lay over the rule. In the converse, upon the failure of a motion to recommend withdrawal, the Committee should adopt a motion to approve or to lay over the rule. If the Committee fails to complete its business on the rule, then the rule should be placed on the agenda for the next meeting to again be considered.