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April 16, 1998

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157-K
Charleston, West Virginia 25305

OFFICE OF THE ATTORNEY GENERAL
SECRETARIAT OF STATE

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Dear Secretary Hechler:

You have requested the opinion of this office concerning matters addressed to your attention by the Honorable Robin C. Capehart, Secretary of Tax and Revenue. More particularly, your letter of April 1, 1998 states:

Enclosed is a copy of a letter dated March 31, 1998, which I received yesterday from Robin C. Capehart, Secretary of Tax and revenue. This letter discusses the status of the two Banking rules, eight Insurance rules and seven Tax rules that were included in HB 4177, which did not pass the 1998 Legislature.

The March 31, 1998, letter of Secretary Capehart states in part:

The Legislature adjourned sine die without passing Committee Substitute for H.B. 4177, which is the bill authorizing promulgation of legislative rules proposed by the Commissioners of Banking, Insurance and Tax. This letter discusses the status of those rules and requests your confirmation of conclusion.

An argument can be made that these rules as last filed in the West Virginia Register now go into effect. . . .

. . . .

The Secretary of State maintains the State Register and the West Virginia Administrative Code of State Rules. In this capacity, your office is responsible for maintaining copies of legislative rules that are in force and effect. In light of the facts and circumstances outlined in

this letter, what is your opinion of the status of the proposed legislative rules embodied in Committee Substitute for H.B. 4177?

Please advise me by April 30, 1998 of your position. We thank you in advance for your prompt attention to this inquiry.

By requesting "your confirmation of our conclusion", Secretary Capehart is effectively asking that you accept the regulations for inclusion in the Code of State Rules ("CSR") notwithstanding the fact that such inclusion in the C.S.R. has not been authorized by the Legislature.

Under West Virginia law, legislative rules proposed by any agency must be approved by the Legislature. See generally, W. Va. Code § 29A-3-1 et seq. More particularly, W. Va. Code 29A-3-9 states:

§ 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, after filing the notice of proposed rulemaking required by the provisions of section five [§ 29A-3-5] of this article, 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 finally approve the proposed 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, within ninety days after the public hearing was held or within ninety days after the end of the public comment period required under section five of this article: Provided, That upon receipt of a written request from an agency, setting forth valid reasons why the agency is unable to file the agency approved rule within the ninety-day time period, the legislative rule-making review committee may grant the agency an extension of time to file the agency approved rule.

Such final agency approval of the rule under this section is deemed to be approval for submission to the Legislature only and does not give any force and effect to the proposed rule. The rule shall have full force and effect only when authority for promulgation of the rule is granted by an act of the Legislature and the rule is promulgated pursuant to the provisions of section thirteen [§ 29A-3-13] of this article.

(Emphasis supplied.)

Clearly, the approval of the Legislature in the form of an "act of the Legislature" is required. This point is reiterated in W. Va. Code § 29A-3-13:

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

(a) Except as the Legislature may be law otherwise provide, within sixty days after the effective date of an act authorizing promulgation of a legislative rule, the rule shall be promulgated only in conformity with the provisions of law authorizing and directing the promulgation of such rule. In the case of a rule proposed by an agency which is administered by an executive department pursuant to the provisions of article two [§ 5F-2-1 et seq.], chapter five-f of this code, the secretary of the department shall promulgate the rule as authorized by the Legislature. In the case of an agency which is not subject to administration by the secretary of an executive department, the agency which proposed the rule for promulgation shall promulgate the rule as authorized by the Legislature.

(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 promptly publish the duly promulgated rule in a code of state rules maintained by his or her office.

Thus, the Secretary of State's role in the process is limited to the ministerial task of publishing a rule, fully promulgated by an agency, following the authorization of its promulgation by and through an act of the Legislature.

In the instant case there is no act of the Legislature authorizing the promulgation of the rules at issue. In point of fact, Secretary Capehart concedes that "[t]he Legislature adjourned sine die without passing . . . the bill authorizing promulgation of . . ." the subject rules. This fact alone is sufficient to resolve the inquiry of Secretary Capehart.

The March 31, 1998 letter from Secretary Capehart posits an argument for accepting the rules for inclusion in the C.S.R. without an authorizing act of the Legislature. In summary, Secretary Capehart, apparently, asserts the Legislature has failed to properly comply with the provisions of W. Va. Code § 29A-3-12(e) which requires:

(e) As a part of any act that amends chapter sixty-four [§ 64-1-1 et seq.] of this code, authorizing the promulgation of a proposed legislative rule or rules, the Legislature may also provide, by general language or with specificity, for the disapproval of rules not approved or acted upon by the Legislature.

This statute was enacted as a curative provision following the decision in State ex rel. Meadows v. Hechler, 195 W. Va. 11, 462 S.E.2d 586 (1995). That

ruling requires the Legislature to act, as a body and officially, through legislation to disapprove legislative rules. W. Va. Code § 29A-3-12(e) authorizes either an act to specifically reject a proposed rule or an act to generally reject all rules not specifically approved.

During the 1998 regular session, the Legislature passed H.B. 4144 which includes the following provision in W. Va. Code § 64-1-1:

All proposed legislative rules for which bills of authorization have been introduced in the Legislature not specifically authorized under articles two through eleven of this chapter are disapproved by the Legislature.

H.B. 4144 is the fulfillment of W. Va. Code § 29A-3-12(e) for 1998 legislative session.

However, Secretary Capehart suggests that H.B. 4144 is in some manner deficient to meet the requirements of W. Va. Code § 29A-3-12(e) and/or the constitutional doctrine expounded in the Meadows decision. Accordingly, Secretary Capehart's letter of March 31, 1998 is a request for the Secretary of State to determine the validity of an act of the Legislature. This is an undertaking which, in this particular circumstance, the Secretary of State has neither the statutory duty nor the constitutional authority to perform.

Statutorily, a thorough review of W. Va. Code § 29A-3-1 et seq. reveals no discretion is vested in the Secretary of State to determine the validity of an act of the Legislature disapproving a proposed rule. As discussed above, the role of the Secretary of State is limited to accepting and publishing rules whose promulgation is authorized by an act of the Legislature. No such authorizing legislation has been passed. No authority is contained in the statute to accept a rule in the absence of appropriate legislation.

Constitutionally, opining on the validity of H.B. 4144 in the manner requested by Secretary Capehart would tend to usurp the role of the judiciary, which usurpation is prohibited by the separation of powers provision of the West Virginia Constitution in Article 5, § 1:

Division of Powers

§ 1. 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.

The West Virginia Supreme Court of Appeals acknowledges that the separation of governmental powers through a tripartite allocation of powers in both state and federal constitutional systems is recognized as one of the chief merits of the American system of written constitutions, and it is essential to the successful working of the system that the persons entrusted with power in any one of these

branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the laws of its creation be limited to the exercise of the powers appropriate to its own department and no other. Harshbarger v. Gainer, 184 W. Va. 656, 403 S.E.2d 399 (1991).

It is the exclusive province of the courts to determine and declare the validity of acts of the Legislature. The judiciary alone has the power to determine whether or not a statute is in harmony with the constitution and declare that statutes which conflict with the constitution shall be void. See State ex rel. County Court v. Demus, 148 W. Va. 398, 135 S.E.2d 352 (1964).

Additionally, even in a judicial challenge to an act of the legislature relating to legislative rules, it is recognized that the proper parties-defendant are the President of Senate and Speaker of the House. c.f. Common Cause of W. Va. v. Tomblin, 186 W. Va. 537, 413 S.E.2d 358 (1991). The Secretary of State is not a necessary party to an action challenging the validity of Legislative action regarding legislative rules:

The Secretary maintains that he was improperly joined as a party to this proceeding as the petition fails to aver that he did anything improper, illegal, or unconstitutional. Petitioners obviously included the Secretary as a party to this action with the hope that the Court would ultimately direct the Secretary to file the proposed regulations as approved in the state register. We concur with the Secretary's observation that his joinder was not required to effectuate any prospective filing of the regulations at issue as he would be required by law to file any approved regulations. (citations omitted.)

State ex rel. Meadows v. Hechler, 195 W. Va. 11, 462 S.E.2d 586, 587, n. 4 (1995).

Accordingly, it is our opinion that the appropriate response to Secretary Capehart's request for confirmation of the opinion expressed in the March 31, 1998 letter regarding the status of the subject regulations is that the statutory authority of the Secretary of State is limited to accepting and publishing rules authorized for promulgation by an act of the Legislature. In this case, an authorizing act of the Legislature is absent. Moreover, for the Secretary of State to exceed the statutory authority and to opine concerning the validity of an act of the Legislature, in this context, would inappropriately preempt the role of the judiciary.

Very truly yours,

Darrell V. McGraw, Jr.
Attorney General

By  Senior Deputy
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