



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

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J. Edward Hamrick, Director
Department of Natural Resources
Building 3, State Capitol Complex
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Mr. Hamrick:

This letter is in response to yours requesting an opinion of the Attorney General regarding the legal propriety and consequences of conducting private meetings with one or more interested parties during rule-making proceedings. Specifically, your questions are:

1. After conducting public meetings on its proposed rules, what would be the legal effect of holding meetings between the promulgating agency and only one interested group?
2. If, in the situation above, said meetings led to changes in proposed rules after their submittal to the Legislative Rule-Making Review Committee, what would be the legal effect on such rules?
3. If, with the approval of the Legislative Rule-Making Review Committee, an agency held meetings to consider changes to proposed rules and such meetings were with only a few designated representatives from varied interested groups, what would be the legal effect on the rules if changes were made after such meetings?

Rule-making proceedings are governed by the provisions of the Administrative Procedures Act, W. Va. Code §§ 29A-3-1 through -17 (1986 and Supp. 1989) unless specifically exempted by the Legislature. Because the Department of Natural Resources ("Department") is not exempted from the Act's application, it must comply with all rule-making provisions contained therein.

The West Virginia Legislature has imposed stringent requirements upon agencies which promulgate regulations. Indeed, after declaring as legislative fact that administrative law is "often formulated without adequate public participation" [W. Va. Code § 29A-1-1 (1986)], the Legislature declared that a rule "shall be and remain effective only to the extent that it has been or is promulgated in accordance" with the rule-making requirements imposed by the Administrative Procedures Act. W. Va. Code § 29A-3-1 (Supp. 1989).

With this general standard in mind, we will now address your specific questions.

1. After conducting public meetings on its proposed rules, what would be the legal effect of holding meetings between the promulgating agency and only one interested group?

Any failure to comply with the statutory rule-making procedures required by the Administrative Procedures Act may result in a declaration that the rule is invalid. W. Va. Code § 29A-4-2 (1986). Review and approval by the Legislative Rule-Making Review Committee and the Legislature does not cleanse the rule-making process of procedural deficiencies.

The Administrative Procedures Act requires the Department to file for publication in the state register, no less than thirty nor more than sixty days prior to any evidentiary or public comment hearing on a proposed rule, a notice containing the date, time, and place of the public comment hearing or period. W. Va. Code § 29A-3-5 (1986). While the Department may limit public comment to only written comment, consideration may only be given to comment which is made prior to the expiration of the public comment period and made in a manner consistent with the notice filed in the state register.

The Department must retain all comment, whether in written form or as tapes or transcriptions of oral comment proceedings, for at least five years. The comment is a public record and must be open to public inspection and copying. Therefore, the public record must include all comments or suggestions for modification during the comment period regardless of the form of the comment or by whom the comment is made.

Therefore, it is our opinion that:

- (A) Meetings between Department personnel and any interested persons must be public meetings, and notices setting forth the date, time, and place of such meetings must be filed for publication in the state register between thirty and sixty days prior to the date of the meeting.
- (B) Any person who desires to make comments regarding a proposed rule must be permitted to do so as long as the comments are made prior to the expiration of the comment period (as set forth on the notice governing the rule-making filed in the state register), and as long as the comments are made in a manner consistent with the limitations imposed in the notice.
- (C) The Department may not accept oral comments if the notice limits comment only to written comment.
- (D) The Department may not accept any comment received after the expiration of the comment period contained on the face of the notice unless the Department immediately files for publication in the state register a notice extending the comment period. All subsequent notices must comply with the requirements of an original notice.
- (E) The Department must maintain a record of all comments, oral or written, relating to a proposed rule and that such record must be retained for a period of five years. The record must also be available to the public for inspection and copying.
- (F) Any oral comment, including oral comment or suggestions for modification in meetings, must be taken down and preserved as a part of the public record.

- (G) Private meetings between Department staff and one or more interested parties which are not taken down, open to the public, and not the subject of a notice regarding the date, time, and place, by filing for publication in the state register for a period of between thirty and sixty days prior to the date of such meeting, are impermissible.
- (H) Failure to provide proper notice of private meetings with one or more groups of interested parties may constitute a procedural defect in the rule promulgation process. As a result, any rule authorized by the Legislature may be declared invalid by petition to the Circuit Court of Kanawha County pursuant to W. Va. Code § 29A-4-2 (1986).

Decisional law in other jurisdictions permits what may be called private meetings in rule-making proceedings. For example, in Center for Science in Public Interest v. Department of Treasury, 573 F. Supp. 1168 (D.D.C.), app. dism'd., 727 F.2d 1161 (D.C. Cir. 1983), the court declared that an agency is not required to log and disclose all contacts, whether by telephone or letter, when engaged in informal rule-making. Therefore, letters and calls from congressmen urging rescission of the regulations did not taint an agency decision. Also, in McSpedon v. Roberts, 459 N.Y.S.2d 233, 117 Misc.2d 679 (1983), a New York court declared that, although it is preferable that all opinions be aired at the mandated public hearing, separate meetings with advocates of a particular position are not improper under the New York Administrative Procedures Act. However, a review of both 5 U.S.C. § 553 and § 202 of McKinney's New York State Administrative Procedure Act clearly indicate that statutory burdens placed upon federal or New York administrative agencies are not as stringent as those imposed by the West Virginia Administrative Procedures Act.

2. If, in the situation above, said meetings led to changes in proposed rules after their submittal to the Legislative Rule-Making Review Committee, what would be the legal effect on such rules?

3. If, with the approval of the Legislative Rule-Making Review Committee, an agency held meetings to consider changes to proposed rules and such meetings were with only a few designated representatives from varied interested groups, what would be the legal effect on the rules if changes were made after such meetings?

Questions 2 and 3 may be answered together since they both involve activities which may occur after the Department has filed an agency approved rule with the Legislative Rule-Making Review Committee. The Administrative Procedures Act and the Legislative Rule-Making Review Committee's rules, unfortunately, provide no guidance for the legislative referral procedures you describe. Indeed, in the face of legislative silence and a lack of relevant controlling decisional law, a conservative approach mandating compliance with agency-phase promulgation procedures is strongly advised.

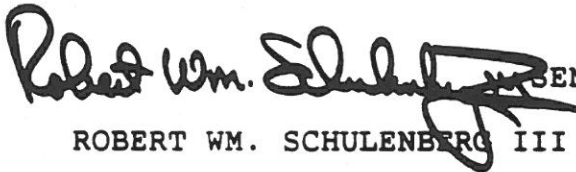
Therefore, it is our opinion, in the situations you describe in questions 2 and 3, that the Department should follow all rule-making procedures required by the Administrative Procedures Act applicable to the agency promulgation process. Such processes include filing notices of public comment hearings, maintaining a transcript of oral comment, retaining all written comment, and allowing any interested person or entity to attend and comment.

I trust that this opinion will be of assistance to you and your staff.

Sincerely yours,

ROGER W. TOMPKINS
ATTORNEY GENERAL

By



SENIOR ASSISTANT

ROBERT WM. SCHULENBERG III

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