ADMINISTRATIVE LAW

S. G. Yurico

Updated by

Jessie Reckart
Bowles Rice, LLP

7000 Hampton Center
Morgantown, WV 26505
Phone: (304) 285-2500
Fax: (304) 285-2530
jreckart@bowlesrice.com

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I. INTRODUCTION

Administrative law is the "branch of law that controls the administrative operations of government. It sets forth the powers that may be exercised by administrative agencies, lays down the principles governing the exercise of those powers and provides legal remedies to those aggrieved by administrative action."[1]

Thus, administrative law encompasses most areas of public policy. Implementation of administrative law occurs through legislatively authorized agencies. The Administrative Procedures Act (APA), which generally governs the procedures of an agency, is found in West Virginia Code § 29A-1-1 et seq.[2]

The APA includes seven articles. These are:

1. Definitions and Application of Chapter;

2. State Register;

3. Rulemaking;

3A. Higher Education Rulemaking[3];

3B. State Board of Education Rulemaking[4];

4. Declaratory Rulings and Declaratory Judgments;

5. Contested Cases;

6. Appeals; and

7. General Provisions.

An administrative agency is defined as "any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases," except those in the legislative or judicial branches.[5] Some agencies, state boards, commissions, departments and officers are not included in W. Va. Code §29A-1-1 et seq. The excluded officials and governmental organizations receive separate treatment in the Code under their own specific

[1] BERNARD SCHWARTZ, ADMINISTRATIVE LAW 2 (2d ed. 1984).

[2] West Virginia adopted the Model State Administrative Procedures Act on July 1, 1964. The APA was first discussed by the Supreme Court of Appeals in State ex rel. Burchette v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966).

[3] This handbook will not address higher education rulemaking.

[4] This handbook will not address rulemaking by the State Board of Education.

[5] W. VA. CODE § 29A-1-2(a).

titles.[6] Counties and local governmental agencies are not included in West Virginia Code §29A-1-1 et seq.[7]

II. SEPARATION OF POWERS

Implementation of legislative directives results in a blending of quasi-legislative and quasi-judicial powers. These powers include the authority to issue rules and regulations that have the force of law, to permit investigation of charges, and to decide cases.[8]

Despite the apparent conflict with separation of powers principles, the courts recognize the legislature's right to delegate to an administrative agency the power to make rules and regulations.[9] The West Virginia Supreme Court of Appeals ("Supreme Court of Appeals") takes the position that although agencies have matters submitted to them in which they "take" evidence, attempt to apply law, and make decisions, these acts are not judicial acts.[10] Rather, the Court characterizes these acts as quasi-judicial.

Generally left free to develop rules and regulations under the legislative delegation of discretionary authority, an administrative agency develops expertise in a particular area. Judicial discretion and deference to agency actions and interpretations of statute by officers or agencies charged with its administration is practiced by the courts because of the expertise developed by the agencies.[11] Therefore, absent an abuse of discretion, the courts generally decline to disturb agency actions.

There are, however, limitations to judicial deference. When an agency reverses course from its precedents, reasonable notice and supporting rationale must be given before the standards are changed. Failure to do so may lead to the inference that the agency's actions are arbitrary and capricious. Such a practice may result in the court's refusal to enforce legislative rules and regulations.[12]

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[6] See e.g., Workers' Compensation, Department of Employment Security, Public Service Commission, Agriculture, and Board of Education, Human Rights Commission. See generally W. VA. CODE §§ 29A-1-3, 29A-5-5

[7] Lipscomb v. Tucker County Commission, 197 W. Va. 84, 475 S.E.2d 84 (1996); Southwestern Community Action Council, Inc. v. City of Huntington Human Relations Comm., 179 W. Va. 573, 371 S.E.2d 70 (1988).

[8] SCHWARTZ at § 1.1

[9] Rowe v. W. Va. Dept. of Corrections, 170 W. Va. 230, 292 S.E.2d 650 (1982)

[10] Wiseman v. Calvert, 134 W. Va. 303, 59 S.E.2d 445 (1950); State v. Huber, 129 W. Va. 198, 40 S.E.2d 11 (1946); see W. Va. Const., art. V, § 1 (1872); Halltown Paperboard Co. v. C. L. Robinson Corp., 150 W. Va. 624, 148 S.E.2d 721 (1966); In re Tax Assessments Against Southern Land Co., 143 W. Va. 152, 100 S.E.2d 555 (1957), overruled on another point; In re Assessment of Kanawha Valley Bank, 144 W. Va. 346, 109 S.E.2d 649 (1959).

[11] United Hosp. Center, Inc. v. Richardson, 757 F.2d 1445 (4th Cir. 1985).

[12] C & P Telephone Co. of W. Va. v. Public Service Comm'n. of W. Va., 171 W. Va. 708, 301 S.E.2d 798 (1983).

Administrative agencies have no general or common law powers. Administrative agencies may only act within the scope of the authority conferred on them.[13] An agency's power, therefore, must be found statutorily either expressly or by implication. An agency's power may not, however, be extended by implication beyond that which is necessary for just and reasonable execution of the power.[14] Responsibility for determining the limits of statutory grants of authority by the legislature is a judicial function entrusted to the courts. West Virginia courts, however, tend to construe an agency's authority broadly enough to prevent the defeat of the statutorily identified purpose.[15] Judicial construction of agency purposes tends to deal with the rights of the public rather than the internal rights of agency employees.[16] Thus, when a court is asked to find implied powers in a grant of legislative authority, it must assume that the lawmakers intended to place no greater restraint on the liberties of a citizen than was clearly and unmistakenly indicated by language used in the statute.[17]

Moreover, any administrative regulation that significantly interferes with the exercise of a fundamental right requires rigorous scrutiny and must be supported by a compelling interest.[18]

III. RULEMAKING

Rulemaking has evolved as the agency's method of policy development. Exchanging places with ad hoc procedure, rulemaking develops uniformity in procedure and compliance with policy. Further, rulemaking puts affected parties on notice of potential changes in administrative procedure.

Rulemaking is defined as the "process for the formulation, amendment or repeal of a rule . . . ."[19] A rule is defined to include every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure.[20] Thus, rules promulgated by an agency must derive their force and effect from the statute under which they are promulgated.

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[13] State Human Rights Comm'n. v. Pauley, 158 W. Va. 495, 212 S.E.2d 77 (1975).

[14] W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Service. Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985), appeal after remand, 180 W. Va. 177, 375 S.E.2d 809; Mountaineer. Disposal Serv., Inc. v. Dyer, 156 W. Va. 766, 197 S.E.2d 111 (1973); Walter v. Ritchie, 156 W. Va. 98, 191 S.E.2d 275 (1972).

[15] Colvin v. State Workmen's Compensation Comm'r., 154 W. Va. 280, 175 S.E.2d 186 (1970).

[16] State ex rel. Burchette v. Taylor, 150 W. Va. 703, 149 S.E.2d 234 (1966); see also Curry State Human Rights Commission, 166 W. Va. 163, 273 S.E.2d 77 (1980).

[17] Walter v. Ritchie, 156 W. Va. 98, 191 S.E.2d 275 (1972).

[18] Southwestern Cmty Action Council. Inc. v. Cmty. Serv. Admin. 462 F. Supp. 289 (S.D. W. Va. 1978).

[19] W.VA. CODE § 29A-1-20(j).

[20] Id. § 29A-1-2(i)

Rules may not be in conflict with the statute nor can they supply omissions of the statute.[21] Furthermore, an agency is not permitted to promulgate rules which alter, limit or conflict with the express provisions of the enacting statute.[22]

There are three classifications of rules identified in the Code. Each classification is defined by the action it permits the administrative agency to take. The three classifications are interpretive rules, legislative rules and procedural rules. An interpretive rule is defined as a rule which is:

> adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests . . . .[23]

A legislative rule is defined as a rule which is proposed or promulgated by an agency which, when affective, "is determinative on any issue affecting private rights, privileges or interests . . . ."[24] A legislative rule has the force of law or may provide a basis for civil or criminal liability. A legislative rule may also grant or deny specific benefits.[25] A procedural rule is a rule "which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency."[26]

Before a procedural or interpretive rule may be promulgated, the agency must provide notice to the public. Notice is accomplished when the agency files the proposed text in the State Register.[27] Notice requirements include the time, place and date of the hearing and must be published in the State Register "not less than thirty nor more than sixty days before the date of such hearing or the last day specified. . ." for receiving written material.[28] Depending on the rule, evidence for any findings and determinations may be taken or an opportunity for public comment may be required. Although it is normally within an agency's discretion to determine the appropriate spokesperson for presentation of opposing viewpoints, it must, under standards of

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[21] Tulley v. State Farm Mutual Auto. Ins. Co., 345 F. Supp. 1123 (S.D. W. Va. 1972); see also Rowe v. W. Va. Dept. of Corrections, 170 W. Va. 230, 234, 292 S.E.2d 650, 653 (1982).

[22] Ney v. State Workmen's Compensation Comm'r., 171 W. Va. 13, 297 S.E.2d 212 (1982); Rowe v. W. Va. Dept. of Corrections, 170 W. Va. 230, 292 S.E.2d 650 (1982); Anderson & Anderson Contractors. Inc. v. Latimer, 162 W. Va. 803, 257 S.E.2d 878 (1979).

[23] W.VA. CODE § 29A-1-2(c).

[24] Id. § 29A-1-2(d).

[25] Id. § 29A-1-2(d).

[26] Id. § 29A-1-2(g).

[27] Id. § 29A-3-4(a).

[28] Id. § 29A-3-7.

reasonableness and good faith, consider a legitimate request by those wishing to express opposing views.[29] The agency has the discretion to limit public comment to a written form.[30]

All findings and determinations shall be filed in the State Register. The agency must include a "statement of reasons and a transcript of all evidence and public comments received pursuant to notice."[31] This information is to remain available for public inspection for at least five years from the hearing date.[32]

All proposed legislative rules, except emergency rules, are submitted to a joint committee of the legislature. The joint committee, known as the Legislative Rule-Making Committee, reviews all proposed legislative rules deemed appropriate.[33] The Committee may hold public hearings on proposed legislative rules but in any event is required to scrutinize the proposed rules for compliance with statutory purpose.[34]

Such review shall include, but not be limited to, a determination of:

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

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

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

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

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

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[29] W. Va. Citizens Action Grp v. Public Serv. Comm'n. of W. Va., 175 W. Va. 39, 330 S.E.2d 849 (1985).

[30] W.VA. CODE § 29A-3-5.

[31] Id. § 29A-3-6.

[32] Id.

[33] Id. § 29A-3-10(a).

[34] The committee does not have the authority to veto rules and regulations otherwise validly promulgated by administrative agencies pursuant to the legislative delegation of rulemaking power. Such action would violate the separation of powers doctrine embodied in the Constitution. Syl pt. 3, State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981); see also State ex rel. W. Va. Citizens' Action Grp v. W. Va. Eco. Dev. Grant Comm'n, 213 W. Va. 255, 580 S.E.2d 869 (2003).

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

(7) Whether the proposed legislative rule was promulgated in compliance with the requirements of this article and with any requirements imposed by any other provision of this code.[35]

The Committee must recommend to the legislature that the agency be authorized to promulgate the rule or part of the rule before the rule may be finalized. The Committee may also recommend that amendments be made to the legislative rule or that the rule be withdrawn.[36]

If an authorized agency finds that an emergency exists, the agency may, without a hearing, promulgate emergency rules.[37] The emergency rules must be filed in the State Register before becoming effective.[38] The Legislative Rule-Making Review Committee shall receive copies of the text of the emergency rules.[39] Such rules are subject to de novo review by "any court having original jurisdiction of an action challenging their validity.[40]

Emergency rules are in effect for not more than fifteen (15) months and may expire earlier if the Secretary of State, acting under his or her authority under W. Va. Code § 29A-3-15a, concludes that the rule exceeds the scope of its legislative authorization, an emergency does not exist that would justify the rule, or the rule was not promulgated in accordance with W. Va. Code § 29A-3-15.[41] Likewise, acting under his or her authority under W. Va. Code § 29A-3-15b, the Attorney General may also disapprove an emergency rule on the same grounds. Furthermore, an emergency rule may be rendered a nullity if:

- The agency fails to file a notice of public hearing on the proposed rule within thirty (30) days of its filing as an emergency rule;
- The agency fails to file the proposed rule with the Legislative Rule-Making Committee within ninety (90) days of its filing as an emergency rule;
- The Legislature has authorized or directed the promulgation of a legislative rule dealing with "substantially the same subject matter" as the emergency rule, since the emergency rule was promulgated; or
- The Legislature disapproves the emergency rule by law.[42]

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[35] W.VA. CODE § 29A-3-11(b).

[36] Id. § 29A-3-11 (c).

[37] Id. § 29A-3-15(a).

[38] Id.

[39] Id.

[40] Id.

[41] Id.

[42] Id. § 29A-3-15(a)(5).

Furthermore, an emergency resolution "remains a nullity and provides no one with a clear legal right to judicial relief, until the statutory mechanisms set forth in the Act for its promulgation are complied with."[43]

IV. CONTESTED CASES

Article Five of the APA addresses "contested cases."[44] A contested case is defined as "a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and shall not include rule making."[45] All parties must be provided with an opportunity for a hearing in contested cases.[46]

Written notice must be provided at least ten (10) days before a hearing in a contested case may occur. The written notice "shall contain the date, time and place of the hearing and a short and plain statement of the matters asserted."[47]

The hearings permit parties to "present evidence and argument with respect to the matters and issues involved . . . . All of the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the advisability of testimony and evidence shall also be reported."[48]

The agency is required to "prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case...." The agency is not, however required to transcribe the testimony unless there is a rehearing or judicial review.[49] Each agency adopts rules of procedures for hearings in contested cases.[50]

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[43] W.VA. CODE § 29A-3-1; Wheeling Barber. College v. Roush, 174 W. Va. 43, 321 S.E.2d 694 (W. Va. 1984).

[44] Id. § 29A-5-1 - 5.

[45] Id. § 29A-1-2(b).

[46] Id. § 29A-5-1.

[47] Id. § 29A-5-1(a); see also Pauley v. Board of Educ. of Mingo Cnty, 179 W. Va. 152, 365 S.E.2d 816 (1988).

[48] Id. § 29A-5-1(a).

[49] Id.

[50] Id.

Provided that it is statutorily authorized, each agency has the power to issue subpoenas or subpoenas duces tecum. Any agency that is granted power to seek a subpoena by statute must exercise that power strictly in conformity with the authorizing statute.[51]

An administrative agency having authority to issue subpoenas duces tecum may seek enforcement of such a subpoena in the circuit court. Enforcement may be sought provided that the inquiry is within the scope of authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant to the authorized inquiry.[52]

Service of a subpoena must occur "at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail." Service by registered or certified mail is proved by a return receipt signed by the person to whom the subpoena or the subpoena duces tecum is directed. The agency will issue the subpoenas and subpoenas duces tecum, but proper service is the responsibility of the parties. Requests for subpoenas and subpoenas duces tecum must be written and include a statement whereby the requesting parties agree to pay any related fees.[53]

W.Va. Code § 29A-5-1(d) provides for impartial hearings in contested cases. This section further empowers the agency, any agency member or any hearing examiner to:

> (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency.[54]

An agency may designate any member within the agency to preside as a hearing examiner provided that such hearing is conducted in an impartial manner, and no inherent conflict of interest is created simply because such agency member serves as a hearing examiner.[55]

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[51] Id. § 29A-5-1(b). Huntington Human Relations Comm'n. ex rel. James v. Realco. Inc., 175 W. Va. 24, 330 S.E.2d 682 (1985).

[52] E. I. du Pont de Nemours & Co. v. Finklea, 442 F. Supp. 821 (S.D. W. Va. 1977).

[53] Id. § 29A-5-1(b).

[54] Id. § 29A-5-1(d).

[55] Marfork Coal Co. v. Callaghan, 601 S.E.2d 55, 215 W. Va. 735 (2004).

In 2013, Senate Bill No. 107 proposed to amend W. Va. Code § 29A-5-1(d)(6) by adding the following language:

> Notwithstanding any provision in this code to the contrary, in any such hearing to be conducted by a hearing examiner, the hearing examiner shall be selected from a panel of five hearing examiners by a process in which the agency first strikes two hearing examiners from the panel and

The rules of evidence apply in hearings.[56] However, the informal nature of administrative hearings may require, in certain circumstances, relaxation of evidentiary rules.[57] Evidence, including papers, records, agency staff memoranda and documents in the possession of the agency shall be offered and made a part of the record in the case.[58] The contents of the document, however, may still be challenged during the hearing.[59]

All parties have the right to cross-examine testifying witnesses. Each party may submit rebuttal evidence.[60] The statute permits agencies to "take notice of judicially cognizable facts." Notice of such action will be provided to the parties by the agency.[61] Errors or omissions in the transcript of the proceedings may also be resolved at a hearing upon a written motion to the agency.[62]

Final orders or decisions of the agency must be in writing and include findings of fact and conclusions of law.[63] Simple recitation of findings of fact in bare statutory language will not suffice.[64] In reviewing the record, the Supreme Court of Appeals will not be bound to accord weight to assertions by administrative agencies which have no foundation in the record before the court.[65]

A party may propose findings of fact and conclusions of law, as well as exceptions to proposed findings of fact and conclusions of law. The agency must rule on any party's proposed findings in a contested case. Such ruling will be disturbed by the courts only upon a showing that the agency abused its discretion. Although the agency does not need to

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the respondent subsequently strikes two hearing examiners from the panel.

The proposed amendment did not progress past the Senate Judiciary Committee.

[56] Id. § 29A-5-2(a).

[57] Id.; Johnson v. State Dept. of Motor Vehicles, 173 W. Va. 565, 318 S.E.2d 616 (1984); see also Rociliano v. Fayette Cnty Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1987) (evidence of teacher's general reputation in community, based on hearsay evidence, may be admissible as exception to hearsay rule in proceeding before school board where character of teacher becomes crucial issue in case).

[58] Id. § 29A-5-2(b).

[59] Lowe v. Cicchirillo, 223 W. Va. 175, 181, 672 S.E.2d 311, 317 (2008) citing Crouch v. West Virginia Div. of Motor Vehicles, 219 W.Va. 70, 76, 631 S.E.2d 628, 634 (2006).

[60] Id. § 29A-5-2(c).

[61] Id. § 29A-5-2(d).

[62] Id. § 29A-5-2(e).

[63] Id. § 29A-5-3; Citizens Bank of Weirton v. West Virginia Bd. of Banking & Financial Inst., 160 W. Va. 220, 233 S.E.2d 719 (1977).

[64] Id. § 29A-5-3; St. Mary's Hosp. v. State Health Planning & Dev. Agency, 178 W. Va. 792, 364 S.E.2d 805 (1987).

[65] Robertson v. Truby, 170 W. Va. 62, 289 S.E.2d 736 (1982); see also Workman v. Workmen's Compensation Comm'n., 160 W. Va. 656, 236 S.E.2d 236 (1977)

extensively discuss each proposed finding, rulings must be sufficiently clear to assure the reviewing court that all proposed findings have been considered and dealt with and have not been overlooked or concealed.[66] Copies of the documents must be served upon each party and his attorney of record, if any, in person or by registered or certified mail.[67]

V. APPEALS AND JUDICIAL REVIEW

All final orders or decisions are subject to judicial review.[68] The review process is initiated by filing a petition in the Circuit Court of Kanawha County or in the circuit court of the county where the petitioner resides.[69] The agency, as well as all other parties of record, must be served with a copy of the petition by registered or certified mail.[70] The appeal may be based on questions of law or questions of fact or both.[71]

Filing an appeal will not stay enforcement of the agency order or decision.[72] Furthermore, delay in the disposition or decision of the case will not invalidate the order or judgment of an administrative body.[73] The agency may stay enforcement, and the appellant, after filing the petition, may apply to the circuit court for a stay.[74] Upon the filing of a petition for appeal and within fifteen (15) days of receipt of the petition, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened.[75] The appellant must provide security for appellate costs. If the court finds that a party has unreasonably refused to stipulate to limit the record, it may tax the party.[76]

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[66] W.Va. Code § 29A-5-3; Modi v. W. Virginia Bd. of Med., 195 W. Va. 230, 232, 465 S.E.2d 230, 232 (1995); St. Mary's Hosp. v. State Health Planning and Development Agency, 178 W. Va. 792, 364 S.E.2d 805 (1987).

[67] Id. § 29A-5-3.

[68] Id. § 29A-5-4(a).

[69] Id.

[70] Id.

[71] Id. § 29A-5-4(b).

[72] Id. §29A-5-4(c).

[73] Id.; Johnson v. State Dept. of Motor Vehicles, 173 W. Va. 565, 318 S.E.2d 616 (1984) (if the decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision, but not how to decide it).

[74] Id. § 29A-5-4(c).

[75] Id.§ 29A-5-4(d).

[76] Id.

The court or judge will assign a hearing date for the appeal to be heard. Such date may not be sooner than ten (10) days after the petition is filed.[77] Appeals taken on questions of law, fact or both shall be heard upon assignments of error filed in the cause or set out in the brief of the appellant. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued.[78]

Without a jury, the reviewing court shall review the record and may hear oral arguments and require written briefs.[79] The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[80]

The right to appeal the final judgment of the circuit court exists for any party adversely affected. Review may be sought "by appeal to the supreme court of appeals of this state . . . ."[81] The statute grants jurisdiction to the court "to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.[82]

The scope of judicial review is narrow. The function of the Supreme Court of Appeals, as the reviewing court, is to review the record and, from the record, determine if the evidence presented supports the findings of the agency. The Supreme Court of Appeals will then

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[77] Id. § 29A-5-4(e).

[78] Id. However, an administrative agency appeal is not subject to local rule governing appellate procedure to circuit court and, therefore, failure to file note of argument under that rule did not warrant dismissal. Kanawha County Local Court Rule 19; W.Va. Code §§ 22A-1A-20, 29A-1-1, et seq., 29A-5-4, 29A-5-4(b). Coffin v. U.S. Steel Min. Co. Inc., 178 W. Va. 673, 363 S.E.2d 750 (1987).

[79] Id. § 29A-5-4 (f).

[80] Id. §29A-5-4(g).

[81] Id. §§29A-5-4, 29A-6-1.

[82] Id. §29A-6-1.

determine whether the circuit court's conclusions follow from the agency's findings. If, however, the record of the proceedings below does not reveal those facts which were determinative of the ruling or the logic behind the ruling, the Supreme Court of Appeals is powerless to review the agency's action.[83] Although the results may appear arbitrary and capricious, the standard of review of agency decisions requires a searching and careful inquiry into the facts. The ultimate scope of review of agency decisions is narrow, and the reviewing court is not empowered to substitute its judgment for that of the agency.[84]

Generally, judicial review of action of an agency must await issuance of a final administrative order enforceable against a person or class of persons. Until an administrative decision has been formalized and its effect felt by the challenging party, judicial review is premature.[85]

There is a further presumption of the validity of the rules duly noticed and promulgated by an administrative agency pursuant to a specific statutory delegation of power. Such a presumption is rebuttable only upon a showing that the challenged regulation is an unreasonable exercise of the delegated power, i.e., inconsistent with the statute.[86]

The agency's determination of matters within its area of expertise is entitled to substantial weight. The reviewing court, however, needs to make searching and careful inquiry into the facts.[87] Where the agency is clearly wrong, the court need not defer to the agency's finding of fact.[88]

Upon judicial review of a contested case, the circuit court shall reverse, vacate or modify the order or decision of the agency if substantial rights of the petitioner or petitioners have been prejudiced. Such prejudice may occur because of administrative findings, inferences, conclusions, decisions or orders which are in violation of constitutional or statutory provisions; which are in excess of statutory authority or jurisdiction of the agency; which are made upon unlawful procedures; which are affected by other error of law; which are clearly wrong in view of the reliable probative and substantial evidence on the whole record; or which are arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion.[89]

There is a general rule that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the

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[83] Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

[84] Id.

[85] Consol. Gas Supply Corp. v. Fed. Energy Reg. Comm'n, 611 F.2d 951 (4th Cir. 1975).

[86] U.S. v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975).

[87] Princeton Cmty. Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985).

[88] Curry v. Gatson, 180 W. Va. 272, 376 S.E.2d 166 (1988).

[89] W.Va. Code § 29A-5-4. St. Mary's Hosp. v. State Health Planning & Dev. Agency, 178 W. Va. 792, 364 S.E.2d 805 (1987).

administrative body. Such remedy must be exhausted before the courts will act. The exhaustion of administrative remedies applies alike to relief at law and relief in equity.[90]

This doctrine is inapplicable, however, where resort to available procedures would be an exercise in futility.[91] Other exceptions to the doctrine include lack of agency jurisdiction or constitutionality of underlying agency statute.[92]

VI. FREEDOM OF INFORMATION

The Freedom of Information Act (the "WVFOIA") is based on the philosophy that the government serves the people. Unless statutorily provided otherwise, the public policy of West Virginia is that all persons are

> entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created . . . .[93]

Disclosure provisions of the WVFOIA are to be construed liberally, and the exemptions to the Act are to be strictly construed.[94]

A person [95] may inspect or copy any public record[96] by directing such request to the custodian[97] of such record.[98] The custodian is required to "furnish proper and reasonable

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[90] Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W.Va. 245, 183 S.E.2d 692 (1971); see also St. Francis Hosp. v. Bower, 802 F.2d 697 (4th Cir. 1986), for the proposition that federal courts will not decide the merits of an administrative case until the plaintiff has exhausted all administrative remedies.

[91] State ex rel. Bd. of Educ. of Kanawha Cnty v. Casey, 176 W. Va. 733, 349 S.E.2d 436 (1986).

[92] State ex rel. Arnold v. Egnor, 166 W. Va. 411, 275 S.E.2d 15 (1981).

[93] W.VA. CODE § 29B-1-1.

[94] Queen v. W. Va. Hosps., Inc., 179 W. Va. 95, 365 S.E.2d 375 (1987); Veltri v. Charleston Urban Renewal Auth., 178 W. Va. 669, 363 S.E.2d 746 (1987); Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985).

[95] A person is statutorily defined as "any natural person, corporation, partnership, firm or association." Id. § 29B-1-2(2).

[96] 'Public record' is statutorily defined to include "any writing containing information relating the conduct of the public's business, prepared, owned and retained by a public body." Id. § 29B-1-2(4); see also Shepherdstown Observer, Inc. v. Maghan, 226 W. Va. 353, 359, 700 S.E.2d 805, 811 (2010) ("[W]e hold that under the West Virginia Freedom of Information Act (FOIA), W.Va. Code, 29B–1–1, et seq., a 'public record' includes any writing in the possession of a public body that relates to the conduct of the public's business which is not specifically exempt from disclosure by W.Va.Code, 29B–1–4, even though the writing was not prepared by, on behalf of, or at the request of, the public body."); Associated Press v.

opportunities for inspection and examination of the records in his office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them."[99] The custodian may, however, make reasonable rules and regulations - necessary for the protection of the records and to prevent interference with the regular discharge of his duties.[100]

Such requests must state with reasonable specificity the information sought.[101] Following a demand for records under the WVFOIA, within five business day the custodian must either (1) furnish copies of the requested information; (2) advise the person making the request of the time and place at which he or she may inspect and copy the materials; or (3) deny the request stating in writing the reasons for such denial.[102] Should the custodian deny the request, the denial must state the reasons why the request was denied, and indicate that the responsibility of the custodian of any public records or public body to produce the requested records or documents is at an end, enabling the government agency claiming exemption from the general disclosure requirement under the Act has the burden of showing express applicability of such exemption to the material requested.[103] Specifically, the government agency bears

> "the burden of showing the express applicability of [the claimed] exemption to the material requested." Conclusory or general assertions on the part of the government agency do not satisfy this burden. Instead, the agency must specifically assert the deliberative process privilege for every document it seeks to protect, without providing information so detailed that it compromises the privilege claimed.[104]

Canterbury, 224 W. Va. 708, 715, 688 S.E.2d 317, 324 (2009) ("It is clear from FOIA's definition of "writing", and we so hold, that the definition of a "writing" contained in W. Va. Code § 29B–1–2(5) (1977) (Repl. Vol. 2007), of the West Virginia Freedom of Information Act includes an e-mail communication.").

In Canterbury, the Supreme Court of Appeals also held that, "Under the clear language of the 'public record' definition, a personal e-mail communication by a public official or public employee, which does not relate to the conduct of the public's business, is not a public record subject to disclosure under FOIA." 224 W. Va. at 722, 688 S.E.2d at 331.

[97] Custodian is the "elected or appointed official charged with administering a public body." W.VA. CODE § 29B-1-2(i).

[98] Id. § 29B-1-3(1), (2).

[99] Id. § 29B-1-3(3).

[100] Id.

[101] Id. § 29B-1-3(4).

[102] Id.

[103] Queen v. West Virginia Hosp., Inc., 179 W. Va. 95, 365 S.E.2d 375 (1987).

[104] Daily Gazette Co., Inc. v. W. Va. Dev. Office, 198 W. Va. 563, 573, 482 S.E.2d 180, 190 (1996) (holding modified by Farley v. Worley, 215 W. Va. 412, 599 S.E.2d 835 (2004)) (citations omitted).

That the person requesting the records the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.[105]

Regardless of WVFOIA's general bent towards disclosure, the statute does identify numerous categories of information which are exempt from disclosure. Generally, a government agency may claim the following types of public records are exempt from disclosure:

(1) information "of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of, privacy, unless the public interest, by clear and convincing evidence, requires disclosure in the particular instance"[106];

(2) information used to administer licensing, employment or academic exams[107];

(3) trade secrets[108];

(4) law enforcement records which deal with detection and investigation of crime[109];

(5) statutorily exempted information[110];

(6) information which describes the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or gifts in which usage is restricted[111];

(7) financial information prepared by an agency which regulates or supervises financial institutions[112]; and

(8) internal memoranda or letters prepared or received by a public body.[113]

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[105] Id. § 29B-1-3(4)(c).

[106] Id. § 29B-1-4(2). An individual, however, is not prohibited by the Act "from inspecting or copying his own personal, medical or similar file." Robinson v. Merritt, 180 W. Va. 26, 375 S.E.2d 204 (1988).

[107] Id. § 29B-1-4(3).

[108] Id. § 29B-1-4(1).

[109] Id. § 29B-1-4(4).

[110] Id. § 29B- 1-4(5).

[111] Id. § 29B- 1-4(6).

[112] Id. § 29B- 1-4(7).

[113] Id. § 29B-1-4(8). A 'public body' is defined as, "every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department,

The privacy exemption is of particular importance. The Supreme Court of Appeals interpreted this exemption to "require a balancing of the public's right to know against the individual's right to privacy," and has explained that its "primary purpose [is to] to protect individuals from the injury and embarrassment which could result from the unnecessary disclosure of personal information."[114] Moreover, the Supreme Court of Appeals has adopted a five factor test for use in deciding whether the public disclosure of information of a personal nature would constitute an unreasonable invasion of privacy:

> (1) Whether disclosure would result in a substantial invasion of privacy and, if so, how serious?
>
> (2) The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
>
> (3) Whether the information is available from other sources.
>
> (4) Whether the information was given with an expectation of confidentiality.
>
> (5) Whether it is possible to mould relief so as to limit the invasion of individual privacy.[115]

Denial of the right to inspect a public body's record allows an individual to seek "injunctive or declaratory relief in the circuit court in the county where the public record is kept."[116] The court shall determine the matter de novo, and, again, the burden is on the public body to sustain its action.[117] If an adequate source of information is available, records will not be released even in cases where the individual fails to present clear and convincing evidence that legitimate reasons exist which would overcome the Act's exemption provisions.[118] The court, on its own motion, may view the documents in controversy in camera before reaching a decision.[119]

A custodian of the records may be found in contempt of court for noncompliance.[120] Additionally, if found to have willfully violated the provisions of Article

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commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority." Id. § 29B-1-2(3).

[114] Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985).

[115] Robinson, v. Merritt, 180 W. Va. 26, 30, 375 S.E.2d 204, 208 (1988).

[116] W. Va. Code § 29B-1-5(1).

[117] Id.

[118] Robinson, 180 W. Va. at 30, 375 S.E.2d at 208; Child Prot. Grp v. Cline, 177 W. Va. 29, 350 S.E.2d 541 (1986).

[119] Id. § 29B-1-5(2).

[120] Id.

29B, a custodian of public records "shall be guilty of a misdemeanor,: and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than ten days, or, in the discretion of the court, by both such fine and imprisonment."[121]

VII. CONCLUSION

There are several sources of information for commentary and guidance on administrative law in West Virginia. These include: Alfred S. Neely, IV, Administrative Law in West Virginia 536 (Michie Co. ed., 1982); Michie's Jurisprudence For Virginia and West Virginia; and Kevin Gillen, Taking Out the Context: A Critical Analysis of Associated Press v. Canterbury, 113 W. Va. L. Rev. 259, 286 (2010).

[121] Id. § 29B-1-6.