WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1964

ENROLLED

SENATE BILL NO. 30

Originating in the Committee on the Judiciary

PASSED February 5, 1964

In Effect July 1, 1964, Passage

FILED IN THE OFFICE OF
JOE F. BURDETT
SECRETARY OF STATE
THIS DATE 2-11-64
AN ACT to repeal section three, article two, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and to amend said code by adding thereto a new chapter, designated chapter twenty-nine-a, relating to rule-making procedures of state agencies and administrative procedures generally; and providing for review of the determinations of state agencies.

Be it enacted by the Legislature of West Virginia:

That section three, article two, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said code be amended by adding thereto a new chapter, designated chapter twenty-nine-a, to read as follows:
CHAPTER 29-A.

STATE ADMINISTRATIVE PROCEDURES

Article 1. Definitions and Application of Chapter.

Section 1. Definitions.—For the purpose of this chapter:

(a) "Agency" means any state board, commission, department or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches;

(b) "Person" includes individuals, partnerships, corporations, associations or public or private organizations of any character;

(c) "Rule" includes 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, but does not include regulations relating solely to the internal manage-
ment of the agency, nor regulations of which notice is
customarily given to the public by markers or signs, nor
mere instructions;

(d) "Rule making" means the agency process for the
formulation, amendment or repeal of a rule;

(e) "Contested case" means a proceeding before an
agency in which the legal rights, duties, interests or priv-
ileges of specific parties are required by law or constitu-
tional right to be determined after an agency hearing,
but shall 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 con-
troversy concerns whether the examination was fair or
whether the applicant passed the examination, and shall
not include rule making; and

(f) "Order" means the whole or any part of the final
disposition (whether affirmative, negative, injunctive or
declaratory in form) by any agency of any matter other
than rule making.

Sec. 2. Application of Chapter.—The provisions of
this chapter shall not apply to rules relating to, or con-
tested cases involving, public elections, the conduct of inmates of public institutions, the conduct of students at public schools or public educational institutions, the conduct of persons in military service or the receipt of public assistance.

The provisions of this chapter shall not apply in any respect whatever to the West Virginia board of probation and parole, the public service commission, the board of public works, the West Virginia board of education, and the board of governors of West Virginia university: Provided. That these named agencies shall comply with section one, article two of this chapter: Provided, however, That any rule promulgated by any such named agency on and after the effective date of this act shall not become effective unless and until two certified copies of such rule have been on file in the office of the secretary of state for sixty consecutive days.


Section 1. Filing Rules.—(a) Each agency shall compile and index all of its lawfully adopted rules which are in force on the effective date of this act and shall file
in the office of the secretary of state two certified copies
of such compilation and index. If any agency shall fail
to file such certified copies on or before January one, one
thousand nine hundred sixty-five, then the rules of such
agency which are not so filed shall become void and un-
enforceable and shall be of no legal force and effect. The
secretary of state shall keep a permanent register of such
rules which shall be open to public inspection during the
office hours of the secretary of state.

(b) The secretary of state shall prescribe by rule a
standard size, format and numbering system for rules to
be filed in his office, making exception where rules issued
by other agencies cannot effectively convey necessary
information within the size and format established. Rules
pertaining to the size, format and numbering system is-
sued by the secretary of state under the authority of this
section shall become effective thirty days after such rules
have been included in the permanent register main-
tained by the secretary of state in accordance with this
section. The secretary of state may refuse to accept for
filing any rules which do not comply with this chapter
Sec. 2. Making Orders and Records Available.—Every agency shall publish or, pursuant to rules adopted in accordance with the provisions of this chapter, make available to public inspection all final orders, decisions and opinions in the adjudication of contested cases except those required for good cause to be held confidential and not cited as precedents. Save as otherwise required by statute, matters of official record shall, pursuant to rules adopted in accordance with the provisions of this chapter, be made available for public inspection.


Section 1. Rules of Procedure Required.—In addition to other rule-making requirements imposed by law:
(a) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this chapter. Such rules shall include rules of practice before the agency, together with forms and instructions.
(b) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.
Sec. 2. **Notice Must Be Given.**—On and after the effective date of this act, no agency shall make any rule unless and until notice thereof has been given to all persons who, in the manner hereinafter provided in this section, have requested notice of any proposed rule. The notice shall either contain the express terms of the proposed rule, or shall contain an informative summary thereof. The notice shall be given by mail as specified in section two, article seven of this chapter. The notice shall include a statement of the time, date and place at which interested persons may submit data, objections, suggested amendments, views, evidence and arguments orally or in writing concerning the proposed rule, and such notice must be given not less than thirty nor more than sixty days prior to the date fixed. The request by any person to receive notice shall be in writing and shall request the agency to notify him of any rule proposed by such agency during the calendar year in which the request is made. Each agency by rule may prescribe the form of such written request for notification, and may require an annual fee in an amount not to exceed one dollar to accompany each
such written request. All such fees shall be deposited in the state treasury to the credit of the state general fund. An agency may, in its discretion, also publish the required notice, at the expense of the agency, in one newspaper of general circulation in the state, or, if the rule has only local application, in one newspaper of general circulation in the locality to which it applies. If an agency determines to give notice also by publication, the publication shall appear at least once. No rule hereafter adopted is valid unless adopted in substantial compliance with the provisions of this section.

Sec. 3. Submission of Data, etc., Concerning Proposed Rule.—On the date and at the time and place specified in the notice required by section two of this article an opportunity shall be afforded all interested persons to submit data, objections, suggested amendments, views, evidence and arguments orally or in writing concerning the proposed rule. The proposed rule may be adopted in the form in which it was proposed, or as amended after the submission of such data, etc., providing the
amendments do not alter the main purpose of the rule as proposed.

Sec. 4. Effective Date of Rules.—After the effective date of this act, each rule lawfully adopted by any agency after notice and after affording interested persons an opportunity to submit data, etc., as required by sections two and three of this article, shall not become effective unless and until two certified copies of such rule have been on file in the office of the secretary of state for thirty consecutive days.

Sec. 5. Emergency Rules.—If, in an emergency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare, an agency may promulgate the necessary rule, in which event the rule shall, notwithstanding the provisions of sections two, three and four of this article, become effective immediately. The agency's finding of an emergency and a brief statement of the reasons therefor shall be filed with the rule. Notice of any such emergency rule shall forthwith be given as prescribed in section two of this article. No such rule shall remain in effect longer
than ninety days unless there is compliance with all the provisions of sections two and three of this article.

Sec. 6. Petition for Adoption of Rules.—Any interested person may petition an agency requesting the promulgation, amendment or repeal of any rule. Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition.

Sec. 7. Publication of Rules.—(a) The secretary of state shall, as soon as practicable after January one, one thousand nine hundred sixty-five, publish as to each agency, in pamphlet form, all rules adopted by such agency and on file in his office. All such pamphlets shall be supplemented or revised as often as necessary.

(b) The secretary of state shall publish a quarterly bulletin in which he shall set forth the text of all rules filed during the preceding quarter, excluding rules in effect on January one, one thousand nine hundred sixty-five.

(c) The secretary of state may in his discretion omit from the publication in pamphlet form or the quarterly
bulletins rules the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if such rules are made available in printed or processed form on application to the adopting agency, and if the publication in pamphlet form or the quarterly bulletins contain a statement stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(d) The quarterly bulletins and the pamphlet publications shall be made available upon request to officials of this state free of charge, and to other persons at a price fixed by the secretary of state to cover the cost thereof and mailing costs. All moneys so received shall be deposited in the state treasury to the credit of the state general fund.

Article 4. Declaratory Rulings and Declaratory Judgments.

Section 1. Petition for Declaratory Rulings by Agencies.—On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. A declaratory rul-
ing, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, but it shall not be binding on any other person. Such ruling is subject to review before the court and in the manner hereinafter provided for the review of orders or decisions in contested cases. Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. 

Sec. 2. Declaratory Judgment on Validity of Rule.—

(a) Any person, except the agency promulgating the rule, may have the validity of any rule determined by instituting an action for a declaratory judgment in the circuit court of Kanawha county, West Virginia, when it appears that the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not
the plaintiff or plaintiffs has or have first requested the
agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds
that the rule violates constitutional provisions or ex-
ceeds the statutory authority or jurisdiction of the
agency or was adopted without compliance with statutory
rule-making procedures or is arbitrary or capricious, or
that, in the case of a rule adopted pursuant to section
five, article three of this chapter, action under said sec-
tion five was not justified.

(c) When the invalidity of a rule has been so declared,
the agency shall, within thirty days after such declaratory
judgment has been entered, acquiesce therein and modify
or rescind such invalidated rule in accord with the re-
quirement of such declaratory judgment unless the
agency promptly, and in any event within such thirty-day
period, notifies the plaintiff or plaintiffs of its intention to
apply for an appeal to the supreme court of appeals from
such declaratory judgment pursuant to section one, article
six of this chapter. In the event such agency shall there-
after make timely application for such appeal, the ac-
32 quiescence of the agency in the invalidity of such rule shall
33 not be required until thirty days after timely applications
34 for such appeal have been refused or within thirty days
35 after the appeal has been dismissed or otherwise disposed
36 of in the supreme court of appeals by an affirmance of the
37 judgment invalidating said rule.

Article 5. Contested Cases.

Section 1. Notice Required; Hearing; Subpoenas; Rec-
2 ords.—(a) In any contested case all parties shall be
3 afforded an opportunity for hearing after at least ten
4 days' written notice. The notice shall contain the date,
5 time and place of the hearing and a short and plain state-
6 ment of the matters asserted. If the agency is unable to
7 state the matters in detail at the time the notice is served,
8 the initial notice may be limited to a statement of the
9 issues involved. Thereafter upon application a more
10 definite and detailed statement shall be furnished. An
11 opportunity shall be afforded all parties to present evi-
12 dence and argument with respect to the matters and
13 issues involved. The required notice must be given as
14 specified in section two, article seven of this chapter.
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 admissibility of testimony and evidence shall also be reported. The agency shall 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, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency shall adopt appropriate rules of procedure for hearing in contested cases.

(b) For the purpose of conducting a hearing in any contested case, any agency which now has or may be hereafter expressly granted by statute the power to issue subpoenas or *subpoenas duces tecum* or any member of the body which comprises such agency may exercise such power in the name of the agency. Any such agency or any member of the body which comprises any such
agency may exercise such power in the name of the agency for any party upon request. Under no circumstances shall this act be construed as granting the power to issue subpoenas or *subpoenas duces tecum* to any agency or to any member of the body of any agency which does not now by statute expressly have such power. When such power exists, the provisions of this section shall apply. Every such subpoena and *subpoena duces tecum* shall be served 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, but a return acknowledgment signed by the person to whom the subpoena or *subpoena duces tecum* is directed shall be required to prove service by registered or certified mail. All subpoenas and *subpoenas duces tecum* shall be issued in the name of the agency, as aforesaid, but any party requesting their issuance must see that they are properly served. Service of subpoenas and *subpoenas duces tecum* issued at the instance of the agency shall be the responsibility of the agency. Any person who serves any such subpoena or *subpoena*
duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state; and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state. All such fees shall be paid by the agency if the subpoena or subpoena duces tecum were issued, without the request of an interested party, at the instance of the agency. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay such fees. Any such agency may compel the attendance of witnesses and the production of books, records or papers in response to such subpoenas and subpoenas duces tecum. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is
to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia rules of civil procedure for trial courts of record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by such agency or any member of the body which comprises such agency, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein. Witnesses at such hearings shall testify under oath or affirmation.
(c) Evidentiary depositions may be taken and read as in civil actions in the circuit courts of this state.

(d) All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power 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 in accordance with the provisions of article three of this chapter.

(e) Except where otherwise provided by statute, the hearing in any contested case shall be held in the county selected by the agency.

(f) Notwithstanding the provisions of subparagraph (a) of this section, upon request to the agency from any
party to the hearing all reported testimony and evidence
at such hearing shall be transcribed, and a copy thereof
furnished to such party at his expense. The agency shall
have the responsibility for making arrangements for the
transcription of the reported testimony and evidence,
and such transcription shall be accomplished with all
dispatch.

Sec. 2. Rules of Evidence; Official Notice.—(a) In
contested cases irrelevant, immaterial, or unduly repeti-
tious evidence shall be excluded. The rules of evidence
as applied in civil cases in the circuit courts of this state
shall be followed. When necessary to ascertain facts not
reasonably susceptible of proof under those rules, evi-
dence not admissible thereunder may be admitted, ex-
cept where precluded by statute, if it is of a type com-
monly relied upon by reasonably prudent men in the con-
duct of their affairs. Agencies shall be bound by the rules
of privilege recognized by law. Objections to evidentiary
offers shall be noted in the record. Any party to any such
hearing may vouch the record as to any excluded testi-
mony or other evidence.
(b) All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(c) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(d) Agencies may take notice of judicially cognizable facts. All parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

(e) Upon motion in writing served by any party as notice may be served pursuant to section two, article seven of this chapter and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the agency shall
settle all differences arising as to whether such transcript
truly discloses what occurred at the hearing and shall
direct that the transcript be corrected and revised in
the respects designated by the agency, so as to make it
conform to the whole truth.

Sec. 3. **Orders or Decisions.**—Every final order or de-
cision rendered by an agency in a contested case shall
be in writing or stated in the record and shall be accom-
panied by findings of fact and conclusions of law. Prior
to the rendering of any final order or decision, any party
may propose findings of fact and conclusions of law. If
proposed, all other parties shall be given an opportunity
to except to such proposed findings and conclusions, and
the final order or decision shall include a ruling on each
proposed finding. Findings of fact, if set forth in statu-
tory language, shall be accompanied by a concise and ex-
plicit statement of the underlying facts supporting the
findings. A copy of the order or decision and accompany-
ing findings and conclusions shall be served upon each
party and his attorney of record, if any, in person or by
registered or certified mail.
Sec. 4. Judicial Review of Contested Cases.—(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia, or with the judge thereof in vacation, or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

(c) The filing of the petition shall not stay enforce-
ment of the agency order or decision or act as a supersedeas thereto, but the agency may stay such enforcement, and the appellant, at any time after the filing of his petition, may apply to such circuit court for a stay of or supersedeas to such final order or decision. Pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, 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. The expense of preparing such record shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court. Any party unreasonably refusing to
stipulate to limit the record may be taxed by the court for the additional costs involved. Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and the court shall order such record filed.

(e) 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 briefs 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. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the
agency, except that in cases of alleged irregularities in
procedure before the agency, not shown in the record,
testimony thereon may be taken before the court. The
court may hear oral arguments and require written briefs.

(g) 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 adminis-
trative findings, inferences, conclusions, decision or order
are:

(1) In violation of constitutional or statutory pro-
visions; 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.

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

Sec. 5. Exceptions.—The provisions of this article shall not apply to the workmen’s compensation fund, the department of employment security, the state tax commissioner, the state road commissioner, the state road commission, and the teacher’s retirement board.

Article 6. Appeals.

Section 1. Supreme Court of Appeals.—Any party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the supreme court of appeals of this state, and jurisdiction is hereby conferred upon such 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.

Section 1. Limitations on Certain Administrative Powers.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law.

Sec. 2. Notice Generally.—Whenever an agency or person is authorized or required to give any notice under this chapter, unless a different method of giving such notice is otherwise expressly permitted or prescribed, such notice shall be given either by personal delivery thereof to the agency or person to be so notified, or by depositing such notice in the United States mail, postage prepaid, in an envelope addressed to such agency or person at the last known address of such agency or person. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the agency, or by affidavit of any person over eighteen years of age, naming the agency or person to which or to whom such notice was given and specifying the time, place and manner of the giving thereof.
Sec. 3. Repeal.—All acts or parts of acts which are inconsistent with the provisions of this chapter are hereby repealed to the extent of such inconsistency, but such repeal shall not affect pending proceedings. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so specifically and expressly.

Sec. 4. Construction and Effect; Severability of Provisions.—Nothing in this chapter shall be held to limit or repeal additional requirements imposed by statute or otherwise recognized by law. No procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of this act. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or its application, and to this end the provisions of this chapter are declared to be severable.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

D. Roy Parker
Chairman Senate Committee

Evel L. Chandler
Chairman House Committee

Originated in the Senate.

Takes effect July 1, 1964

H. W. Hope
Clerk of the Senate

M. A. Blankenship
Clerk of the House of Delegates

Howard W. Carmo
President of the Senate

William W. Fleming
Speaker House of Delegates

The within approved this the 13th day of February, 1964.

Governor