



State of West Virginia

Department of Mines

Charleston 25305

JOHN D. ROCKEFELLER, IV.
Governor

WALTER N. MILLER
Director

TO: Mr. Robert Jackson
Secretary of State's Office

FROM: Tina Estep, ~~State~~ Secretary
Department of Mines

SUBJECT: Revised page of Administrative Regulation Series 39
Rules and Regulations Governing Requests for Infor-
mation (Freedom of Information Act)

DATE: October 17, 1984

As per our conversation yesterday afternoon, please find attached two (2) copies of the revised page 6 of the Department of Mines Administrative Regulations 22-4, Series ~~38~~¹⁷ Freedom of Information.

The new page will replace the one previously submitted on June 22, 1983. The change made at this time is under Section 8.01, paragraph (f). Your copy will have a fee schedule attached, and the amended copy will state "that a fee schedule is available upon request from the Department of Mines office."

If you have any questions, please feel free to call me at 348-3937.

Enclosure (2)

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

DEPARTMENT OF MINES

CHAPTER 22-4

SERIES 2517

(1984)

SUBJECT: RULES AND REGULATIONS GOVERNING REQUESTS FOR INFORMATION (FREEDOM
OF INFORMATION ACT)

PROMULGATED
REGULATION

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE 6-22-83

Administrative Law Division

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

DEPARTMENT OF MINES

CHAPTER 22-4

SERIES 3917

(1983)

SUBJECT: Rules and Regulations Governing Requests for Information

WHEREAS, the State Department of Mines is a public body subject to the provisions of Chapter 29B-1-1 et seq. of the West Virginia Code, 1931, as amended, (commonly known as the Freedom of Information Act) and

WHEREAS, the purpose of such Act is to ensure the full and complete disclosure of agency records to the public.

Now, therefore, the Department promulgates the following procedural rules for the implementation of the provisions of said Act:

Section 1. General

1.01 Scope - These rules prescribe procedures under which the public may inspect and obtain information and records generated, developed or held by the Department of Mines. These rules do not apply to the disclosure of information to any officer, employee or authorized representative of the State or Federal government.

1.02 Authority - These rules are promulgated pursuant to the authority of Chapter 29B-1-1 et seq., and Chapter 29A-3-3, of the West Virginia Code, 1931, as amended.

1.03 Filing Date - These rules were filed in the Office of the Secretary of State on the 15 day of October, 19 83.

1.04 Effective Date - These rules become legally effective on the 22nd day of July, 19 83.

1.05 Certification - These rules are certified authentic by the Director of the Department of Mines.

Section 2. Definitions

2.01 For the purposes of these rules:

- (a) "Act" means the Freedom of Information Act, Chapter 29B-1-1 et seq.
- (b) "Department" means the State Department of Mines, and all boards, divisions and offices thereof.
- (c) "Record" means any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics which are possessed by the Department. The term does not include materials that are legally owned by a Department employee in his or her personal capacity and does not include materials which are readily available to the public such as books, journals and periodicals available through a reference library. Nor does the term include documents that have been advertised as being available to the public, such as applications or draft permits, draft plans, laws and regulations or other reports and brochures which may be obtained without a written request.
- (d) "Request" means a written request to inspect or obtain a copy of one or more records.
- (e) "Requestor" means any person, including any natural person, corporation, partnership, firm or association, who has submitted a request to the Department.

Section 3. Policy on Disclosure

3.01 (a) All Department records shall be available to the public unless they are exempt from the disclosure requirements of the Act.

(b) All nonexempt records shall be available to the public upon request regardless of whether any justification or need has been shown by the requestor and regardless of whether or not the request cites the Act.

Section 4. Form of Request

4.01 A request shall be made in writing, shall reasonably describe the records sought in a way that will permit their identification and location and should be addressed to the West Virginia Department of Mines, at Room E-153, State Capitol, Charleston, West Virginia 25305 for Department records.

(a) Requests which do not reasonably describe records sought. If the description of the records sought in the request is not sufficient to allow the Department to identify and locate the request records, the requestor will be notified within five working days that the request cannot be further processed until additional information is provided. Until such additional information is provided, the five-day time limit under Section 5 shall not begin.

(b) Misdirected requests; oral requests. The Department cannot assure that requests received by offices other than those referenced in Section 4.01 will be answered in a timely manner. The five-day period, as provided for in Section 5, shall begin at the time the Department receives the request. Oral or phone requests for the records may be honored if followed by a written request. The written request may be hand delivered if previous arrangements for an appointment or to receive copied material have been made by phone.

Section 5. Responsibilities of the Department

5.01 (a) The Department shall, upon receipt of a written request, mark the request with the date of receipt, and begin to identify and locate the requested information or ask for a more specific request under Section 4.01(a) if necessary.

(b) The Department shall respond in writing to the requestor within five working days of the receipt of the request. Such response shall:

- (1) Furnish copies of the requested information;
- (2) Advise the requestor of the time and place at which he/she may inspect and copy the information; or
- (3) Deny the request stating in writing the reason for such denial.

5.02 (a) Denials of requests may be issued only in following circumstances:

- (1) The requested record is not known to exist;
- (2) The record is not the Department's possession;
- (3) The record is exempt from disclosure under the Act.

(b) A letter informing the requestor of the denial must be sent within the time period specified in Section 5. The letter must clearly state the basis for the denial. The denial notice shall inform the requestor that he or she may appeal the agency's action in accordance with the provisions of Chapter 29B.

Section 6. Exemptions

6.01 The following categories of information are specifically exempt from disclosure under the provisions of the Act:

(a) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which

is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors;

(b) 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: Provided, that nothing in this article shall be construed as precluding an individual from inspecting or copying his own personal, medical or similar files;

(c) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

(d) Records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement;

(e) Information specifically exempted from disclosure by statute;

(f) Records, archives, documents or manuscripts describing the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or constituting gifts to any public body upon which the donor has attached restrictions on usage or the handling of which could irreparably damage such record, archive, document or manuscript;

(g) Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency respon-

sible for the regulation or supervision of financial institutions, except those reports which are by law required to be published in newspapers; and

(h) Internal memoranda or letters received or prepared by any public body.

Section 7. Partial disclosure

If a requested record contains both exempt and nonexempt material, the nonexempt material shall be disclosed after the exempt material has been deleted.

Section 8. Fees

8.01 Fees will be charged requestors for searching for and reproducing requested records, in accordance with the following:

(a) Copying costs shall be .25 per page, provided that if the total cost is less than \$1.00, there shall be no charge.

(b) The charge for copying materials that must be reproduced outside the Department's facilities shall be the actual cost of such copying.

(c) A search and copying fee of \$5.00 per hour or fraction thereof shall be charged for the agency's time spent in trying to locate and copy requested records beyond the initial half hour used to locate and copy such records.

(d) An invoice for the total amount of fees will be sent to the requestor. Checks or money orders shall be made payable to the Department of Mines.

(e) Total or partial prepayment may be required if the Department determines that the unpaid fees attributable to one or more requests by the same requestor exceed or will exceed \$15.00.

(f) A fee schedule is available upon request in the Department of Mines office.



Series 1

State of West Virginia

Department of Mines

Charleston 25305

JOHN D. ROCKEFELLER, IV.
Governor

WALTER N. MILLER
Director

Rules and Regulations Governing Procedures and Practice Before the Department of Mines

ABSTRACT OF PROMULGATION HISTORY AND SUMMARY OF COMMENTS

The procedural rules of the Department of Mines have been under discussion and review since at least early 1977. Several proposals have been submitted for public comment and comments have been received and incorporated into various drafts by the Office of the Attorney General and the Department's Hearing Examiner. The final regulations, filed this day, reflect the culmination of these efforts and provide a written framework for all contested cases before the Department of Mines.

On August 31, 1982, the Director filed a notice of proposed rulemaking with the State Register asking for written comments on the proposed procedural rules on or before October 1, 1982. These comments were received and constitute the remainder of this description.

Part 1

This part is a general statement of the scope of the regulations and includes definitions, designations of parties to various proceedings and sets forth general provisions relating to contested cases before the Department.

One comment received suggested that the definition of "Presiding Officer" in Section 1.05(i) be amended to require such person to be admitted to practice as an attorney at law. The Department rejected this requirement to allow the Director the discretion to appoint

non-lawyers to conduct hearings. Presently, the Hearings Examiner is a licenced attorney and all proceedings are conducted by him.

Section 1.06(a) in line three, the word "where" is changed to "when".

Section 1.06(e) was suggested to be amended to provide that the miners at a mine could elect not to be parties to review and assessment proceedings. This comment is rejected as unnecessary because miners or their representatives may elect not to be parties merely by their failure to respond to the notices required to be issued under Code 22-1-14 and Code 22-1-17.

Section 1.10(b) was amended to read as follows:

"A further and better statement of any cause or ground of complaint or defense, or a further and better statement of particulars of any matter stated, in any document, may in any case be ordered at the discretion of the presiding officer."

Section 1.15(b) has been amended to allow the Presiding Officer to grant extensions of time limits for good cause shown, not merely excusable neglect.

Section 1.16(a) relating to Discovery has been amended to allow discovery to be completed within 60 days after commencement of a proceeding. Additionally Section 1.16(e) is amended to allow the Presiding Officer to issue an order regarding depositions if the parties cannot agree to an acceptable schedule.

One commentator pointed out that the proposed rules did not contain provisions prohibiting ex parte communications between persons outside the Department and the Department's Staff on the one hand and the Department and the Staff on the other. An ex parte contact has been defined by Professor Neely in his recent treatise as an oral or written communication with the presiding officer in a contested case which is not on the record in the proceeding and for which there is no prior notice

to some or all of the parties. See Neely, Administrative Law in West Virginia, § 5.43. The State Administrative Procedures Act, Chapter 29A, contains no express provision on the propriety of ex parte, however a prohibition of such contracts is said to be implicit in the requirement of exclusivity of the record. Additionally, the provisions of Code 29A-5-2(b) state that "no other factual information or evidence shall be considered in the determination of the case." other than that contained in the record. Much of this concern is based upon principles of procedural due process.

The remedies for ex parte communication in West Virginia administrative proceedings have usually required the communication to be placed on record and allow the record to be reopened for further evidence. Neely id at p.p. 381, 382. The final rules include provisions relating to ex parte contacts which are patterned after the Federal Mine Safety and Health Review Commission Rules of Procedure, 29 C.F.R. § 2700.82, and are designated as Section 1.17. If future operation of this rule is found to be inadequate to protect the exclusivity of the record and due process, a more detailed provision may be adopted, by amendment.

Part 2

This part relates to the procedures involving the assessment of civil penalties. Certain grammatical changes were made in Section 2.04 in order to clarify the language. Specifically, the word "a" was added before the word "coal" in line one of Section 2.04(a) and the order of the last two sentences of Section 2.04(c) were reversed.

Section 2.07 was changed to insert the terms "party or parties" for the phrase "the operator, miner, person or persons." Additionally, the title of the section was changed to simply "Conference" rather than "Request for Conference." Section 2.07(c) was changed to provide for the vacating of notices or orders where the assessment review officer finds that no violation exists.

Section 2.08 was changed to insert the term "Notice of Assessment Proceeding" in place of the phrase "notice of hearing to assess civil penalty." These same changes are made throughout Sections 2.09, 2.10, 2.11 and 2.12.

Part 3

This part relates to the general conduct of hearings before the Presiding Officer.

Section 3.03(a) (5) was changed to delete the consent to the Director where discovery depositions are permitted by the Presiding Officer.

Section 3.05 provides a procedure whereby a party may request a postponement or relocation of a hearing. The Presiding Officer may grant this request if good cause is shown. This decision is left to the discretion of the Presiding Officer in line with the language of Code 29A-5-1(e) where it provides that "[e]xcept where otherwise provided by statute, the hearing in any contested case shall be held in the county selected by the agency."

One of the comments received stated an objection as to the control which the Director has over the decision making process. The Code provides in, 22-1-16 and 22-1-20, that the Director gives the opportunity for hearings and renders a decision. Code 22-1-4(3) authorizes the Director to employ such persons as are necessary to fully and effectively carry out the provisions of the law. The present Hearing Examiner's position is funded through a grant under Section 502 of the Federal Mine Safety and Health Act of 1977. The present system of administrative review under the West Virginia Coal Mine Safety Laws was patterned after the Federal Coal Mine Health and Safety Act of 1969 where all decisions were rendered by the Secretary of the Interior.

In order to meet some of the objections as to bias and impartiality in decision-making, Section 3.11(b) and Section 3.12 have been amended to establish a procedure where a recommended decision is rendered by the Presiding Officer. The recommended decision of the Presiding

Officer will be served upon all parties at the time of submission to the Director. Any party may request rehearing by the Director of the Presiding Officer's decision within 15 days of its service. Such request shall be pursuant to the rehearing provisions of Section 3.12. The Director may hold a hearing for purposes presenting argument on the review after notice to all parties. The Director may reverse the decision of the Presiding Officer and issue a final decision in the matter, remand the matter to the Presiding Officer for further taking of evidence or affirm and adopt the decision of the Presiding Officer as the Director's final order.

Part 4

This part relates to proceedings arising under Code 22-1-16 involving review of notices of violation. The only changes made to the proposed regulation in response to comments are grammatical changes with the exception of the addition of the words "a notice of violation or" in the fourth line of Section 4.03(b) to clarify the right to request review of the termination or modification of a notice of violation.

Part 5

This part establishes a procedure whereby the provisions of Code 29A-4-1 may be utilized by the public.

That Code provision states:

"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 ruling, 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, if 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."

Comments received relating to this part objected to the use of interpretations by Department of Mines personnel. Inasmuch as an interpretation of the applicability of a particular statute to a state of facts is the purpose of a declaratory ruling, this part has not been substantially changed in response to the comment. Any question relating to the method of enforcement of the Mine Safety Laws could be subject to a declaratory ruling.

A review of Professor Neely's treatise on administrative law relating to declaratory rulings by agencies points out the fact that an agency has no obligation to issue a declaratory ruling unless it is inclined to do so. He also states that judicial review of an agency's actions is inevitable if a disenchanted person wishes to seek such review, citing Walls v. Miller, 251 S.E.2d 491 (W.Va. 1978). See, Neely, supra §4.27 at p.p. 164 - 168.

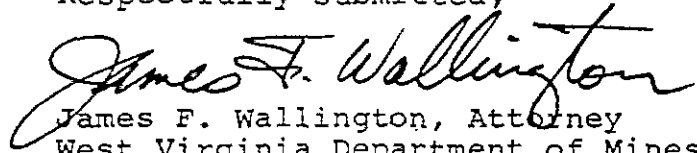
Section 5.06 (a) has been changed to reflect more clearly the discretionary nature of the issuance of declaratory rulings while keeping in mind the readily available remedy of extraordinary writs.

Conclusion

These rules are filed as finally adopted procedural rules of the Department of Mines. The text has been reviewed and comments made by persons within the industry and the United Mine Workers along with private attorneys representing various clients with an interest in activities of the Department. These rules have been drafted with the intent to follow past practice before the Department's Hearing Examiner and to provide guidance to the public.

As suggested by one commentator, these rules will be closely evaluated on an ongoing basis to determine their impact, particularly within the first year of their operation. Any further suggestions, comments or proposed amendments to these rules will be appreciated on an informal basis.

Respectfully submitted,


James F. Wallington, Attorney
West Virginia Department of Mines

JFW/cao