

WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

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OFFICE WEST VIRGINIA
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Form #1

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Public Service Commission TITLE NUMBER: 150

RULE TYPE: Legislative CITE AUTHORITY: 24F-1-1, et seq.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 28

TITLE OF RULE BEING PROPOSED: Rules Governing Fees for the Setting of United States
Veterans' Affairs Grave Markers and Related Transactions

DATE OF PUBLIC HEARING: May 10, 2005 TIME: 9:30 a.m.

LOCATION OF PUBLIC HEARING: Howard M. Cunningham Hearing Room
Public Service Commission
201 Brooks Street
Charleston, WV 25301

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

*Oral comments may be presented at the hearing on
May 10, 2005

**Written comments are due no later than
April 5, 2005, and should be mailed to
Sandra Squire at the address listed to the right.

Sandra Squire, Executive Secretary
Public Service Commission
P. O. Box 812

Charleston, WV 25323

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



E. H. Staats, ^{Authorized Signature} Chairman

\$5.00

OK/REH/cws

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

04 DEC -9 AM 9:01

WEST VIRGINIA PUBLIC SERVICE COMM.
LEGAL DIVISION

September 2004 Term

FILED

December 8, 2004

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31719

WEST VIRGINIA CEMETERY AND FUNERAL ASSOCIATION, BEVERLY HILLS
MEMORIAL GARDENS, INC., PALM MEMORIAL GARDENS, INC., FOREST
LAWN CEMETERY, INC., MOUNTAIN VIEW MEMORIAL PARK, and SEARS
MONUMENT CO., INC,
Appellants

v.

WEST VIRGINIA PUBLIC SERVICE COMMISSION,
Appellee

Appeal from the West Virginia Public Service Commission

AFFIRMED, IN PART, REVERSED, IN PART, AND REMANDED

Submitted: September 15, 2004

Filed: December 8, 2004

Dennis R. Vaughan, Jr., Esq.
The Vaughan Law Firm
Charleston, West Virginia
Troy N. Giatras, Esq.
Mark L. French, Esq.
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Charleston, West Virginia
Attorneys for Appellant

Cassius H. Toon, Esq.
Charleston, West Virginia
Attorney for Appellee

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. “The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W. Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission’s findings; and, (3) whether the substantive result of the Commission’s order is proper.” Syl. Pt. 1, *Central West Virginia Refuse, Inc. v. Public Service Commission*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

2. “As a general rule the Legislature, in delegating discretionary power to an administrative agency, such as a board or a commission, must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient to guide such agency in the exercise of the power conferred upon it.’ Syl. Pt. 3, *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956).” Syl. pt. 4, *State ex rel. WV Citizens Action Group v. Economic Development Grant Committee*, 213 W. Va. 255, 580 S.E.2d 869 (2003).

3. “The delegation by the legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their exercise, is not of itself

unconstitutional.’ Point 8 Syllabus, *Chapman v. Huntington, West Virginia, Housing Authority*, 121 W. Va. 319 (3 S.E.2d 502) [1939].” Syl. pt. 5, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969).

Per Curiam:

I.
FACTS

Facts in this case are undisputed. On March 8, 2003, the Legislature passed Senate Bill No 494, now codified at W. Va. Code § 24F-1-1 *et seq.* This statute authorizes the West Virginia Public Service Commission (the "Commission") to regulate the installation of certain markers that the United States Veterans Administration provides free of charge to the families of qualified veterans.

At issue in this case is the price schedule established by the Commission that limits the prices that cemeteries may charge for the installation of grave markers for deceased veterans. Specifically, the statute regulates three types of installations: placing the marker in a concrete base, attaching the marker to a stone slab purchased separately and provided by the family, or attaching the marker to a stone slab sold to the family by the installer. The Public Service Commission ultimately set the rate for each of these services as follows: \$50 for the simple concrete installation, \$200 for a stone installation with the family providing the headstone, and \$380 for a stone installation with the purchase of the stone included.

The Public Service Commission (hereinafter "the Commission"), arrived at these rates after publishing a notice in newspapers throughout the state and serving notice

upon the Division of Veteran Affairs and appellant, the West Virginia Cemetery and Funeral Association. The Commission then set a hearing for July 9, 2003. At that hearing, the Commission heard testimony from members of several veterans groups. It appears from the record that these veterans groups had sought some sort of price limits on marker installations for several years.

Monument company representatives and representatives of several cemeteries also testified at the hearing and expressed their concerns that a fixed price for installing the markers could harm their businesses. Although the language used by the Commission in its notice of hearing (discussed *infra*) suggested it might hold additional hearings, the Commission held no further hearings. On October 7, 2003, the Commission issued proposed rules setting forth price ceilings for the various methods of installation and established a one month public comment period for the rules, which expired on November 7, 2003. During this period the Commission published the proposed rules in newspapers throughout the state, provided them to the Secretary of State's Office, and served them on several interested parties.

Appellants West Virginia Cemetery and Funeral Association and Sears Monument Company, along with several other cemeteries, submitted written comments on the proposed rules. Other parties providing comments included the West Virginia Veterans

Coalition, the American Legion, and decorated veteran, Hershel Woody Williams. Using the information provided at the hearing, and after considering the comments filed in response to the rules, the Commission issued an order on December 16, 2003 setting final rules and establishing the price schedule described above.

Numerous aspects of this order, and the regulations relating to it, are challenged by the appellants. The appellants claim that the statute is an unconstitutional delegation of the Legislature's authority. They also claim several procedural defects in both the statute and the process used by the Commission to create its rules.

For the reasons set forth below, we find the statute to be constitutional, but agree that the Commission failed to follow procedure when creating the rules. We order the Commission to hold a new hearing within 180 days, and further order that the existing price schedule must stay in effect until that hearing can be conducted and new rules issued by the Commission.

II. STANDARD OF REVIEW

Reviewing an order of the West Virginia Public Service Commission, this Court considers several issues:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W. Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

Syl. Pt. 1, *Central West Virginia Refuse, Inc. v. Public Service Commission*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

III. DISCUSSION

One of appellant's arguments is that in enacting W. Va. Code § 24F-1-1 *et seq.*, the Legislature made an unconstitutional delegation of its authority. The thrust of this argument is that the Legislature may delegate its authority so long as the enabling legislation contains an express standard for the Commission (or other rule-making body) to follow. This Court has held that the Legislature must be careful in providing adequate guidance to a rule-making body when delegating any of its authority:

"As a general rule the Legislature, in delegating discretionary power to an administrative agency, such as a board or a commission, must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient to guide such agency in the exercise of the power conferred upon it." Syl. Pt. 3, *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956).

Syl. pt. 4, *State ex rel. WV Citizens Action Group v. Economic Development Grant Committee*, 213 W. Va. 255, 580 S.E.2d 869 (2003).

Moreover, we agree with the appellants that the Legislature may not simply direct the Commission to "regulate grave markers" without any guidance. However, we believe that the statute does contain adequate guidance to the Commission. The statute first grants the Commission the authority to regulate charges for veterans markers:

(a) In addition to its other powers and duties, the public service commission may determine, establish and modify, in a manner that it considers appropriate, the fees and total charges imposed by cemeteries and companies that set and install memorial monument markers for the setting of United States department of veterans' affairs grave markers at the graves of deceased United States armed forces veterans.

W. Va. Code § 24F-1-2(a) (2003). Appellants claim that this is an impermissible grant of legislative authority. Were the statute to stop there, we would be inclined to agree.

However, the statute goes on to give more specific directions:

If the commission establishes fees and total charges as authorized by this section, it shall establish:

(1) A maximum fee schedule to be designated "the regional permanent endowment care fund" which represents the costs to a cemetery for the perpetual care of the grave marker; and

(2) A maximum fee schedule to be designated as "the regional installation fees" which represents the costs of installation of the veteran grave marker.

Any fees established under this section shall consider regional market forces and may consider classes of veterans' markers or any other relevant conditions. The fees described in this section, when added together, shall be designated as the "total charges" permitted for the installation of a veteran's affairs memorial marker. No other fees, charges or other costs may be assessed to the veteran's estate or family for the installation or maintenance of the veteran's grave marker.

(b) Any fees and total charges established by the public service commission may only apply to the installation of memorial markers that are provided to the veteran without charge by the U. S. government upon application.

W. Va. Code § 24F-1-2 (2003).

Only the free markers for Veterans provided by the federal government are regulated by the statute. Thus the statute is quite narrow in scope. The Legislature specifically directed the Commission to consider market forces, and to apply its rate schedule only to the markers in question. As this Court has explained: "'The delegation by the legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their exercise, is not of itself unconstitutional.' Point 8 Syllabus, *Chapman v. Huntington, West Virginia, Housing Authority*, 121 W. Va. 319 (3 S.E.2d 502) [1939]." Syl. pt. 5, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969). In light of the guidance and standards provided by the Legislature and considering the statute's limited reach, we believe that it passes constitutional muster.

Having said this, we do agree with the appellants that the Commission failed to follow proper procedures in creating the fee schedule at issue. As we noted above, the language used by the Commission in its notice of hearing suggested that affected parties would have more than one opportunity to provide testimony and evidence regarding the proposed rules:

On July 9, 2003 the Commission will hold a hearing in this case for the purpose of hearing comments and proposals from interested persons as to the procedures to be adopted by the Commission, *if any*, pursuant to Senate Bill 494. These comments will be helpful to the Commission in determining its future course of action. *If* the Commission decides to issue proposed rules, there will be an additional public comment opportunity.

(Emphasis supplied). While the Commission might argue that the month long public comment period gave the affected parties an adequate opportunity to provide constructive criticism, we disagree. Though the Commission is correct in asserting that it had no legal requirement to conduct an additional hearing, the above language used by the Commission as well as comments made during the hearing suggested that there would be an additional hearing.

In addition, the one hearing conducted by the Commission had some obvious shortcomings. No testimony was taken under oath. The appellants did not have the opportunity to cross-examine those who spoke at the hearing. According to appellants, the Commission failed to consider the location of any specific cemetery, price fluctuations in

materials, or the differences in labor costs between small and large cemeteries. These are all elements that may be beyond the control of the cemetery or installer, and should have been considered by the Commission.

Of greatest concern to this Court, it appears that the Commission failed to follow a specific dictate of the Legislature in drafting its proposed rules. The statute commands that: "Any fees established under this section shall consider regional market forces and may consider classes of veterans' markers or any other relevant conditions." W. Va. Code § 24F-1-2 (2003). This is an issue that cannot be ignored, and should be fully developed during the next hearing.

In summation, we believe that the statute is constitutional and fulfills a laudatory purpose of providing some certainty for grieving families in a difficult and vulnerable time in their lives. However, because we find fault with the procedures used by the Commission, we conclude that the Commission must hold an additional hearing.

IV. CONCLUSION

Accordingly, we order the Commission to hold an additional hearing within 180 days. At that hearing, the Commission should consider relevant market forces, and any other considerations required by the statute. However, in the interests of predictability for

the grieving families of deceased veterans, the current price schedule shall remain in effect until the Commission can hold the new hearing and issue new rules.

Affirmed in part, Reversed in part, and Remanded.



Public Service Commission

Richard E. Hitt, General Counsel

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323

Phone: (304) 340-0317
FAX: (304) 340-0372

February 7, 2005

Judy Cooper, Director
Administrative Law Division
Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

Dear Judy:

Attached is a notice of public hearing on a proposed rule. This matter relates to the Veteran Affairs Grave Markers which was recently sent back to us by the Supreme Court. This is the rulemaking that I recently spoke to you about on the telephone. For your files, I am enclosing a copy of the Supreme Court's Decision in the Veteran's case.

As you can see, we are giving the public the opportunity to submit written comments as well as make oral comments at the hearing. In addition to filing this form with your office, our Secretary's Office will cause publication of the procedures in the case to be made throughout the State, as indicated in the enclosed Commission Order. I understand that after we finish our hearing and make a decision, we can file changes to the rule, if any, as final rules.

I thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Hitt", written over the typed name.

RICHARD E. HITT
General Counsel
(304)340-0317

REH/mh
Enclosure

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**TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION**

FILED

2005 FEB -9 A 9 52

SERIES 28

**RULES FOR THE GOVERNMENT OF FEES FOR INSTALLATION OF
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS GRAVE MARKERS**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§150-28-1. General.

1.1. Scope. -- These Rules govern fees for installation of United States Department of Veterans Affairs Grave Markers provided free of charge to families of deceased United States Armed Service veterans.

1.2. Authority. -- W. Va.. Code §24F-1-1 et seq.

1.3. Filing Date. -- December 16, 2003.

1.4. Effective Date. -- February 17, 2004.

1.5. Purpose. -- These Rules establish price ceilings that may be charged by service providers, as defined herein, for the setting and installation of United States Department of Veterans Affairs Grave Markers provided free of charge to families of deceased United States Armed Services veterans.

1.6. Application.

1.6.a. These Rules apply to service providers as defined herein.

1.6.b. If hardship results from the application of any rule or if unusual difficulty is involved in immediately complying with any rule, application may be made to the Commission for the modification of the rule or for temporary or permanent exemption from its provisions. Provided, that no application for modification or exemption will be considered by the Commission unless there is submitted therewith a full and complete justification for such action.

1.7. Definitions.

1.7.a. Basic Installation. -- The permanent installation of a Veteran's Marker on a concrete base without a stone slab.

1.7.b. Stone Installation. -- The permanent installation of a Veteran's Marker on a stone slab with or without a concrete foundation, where the Customer provides the stone slab.

1.7.c. Stone Purchase Installation. -- The permanent installation of a Veteran's Marker mounted on a stone slab, with or without a concrete foundation, when the stone slab is purchased by the Customer from the Service Provider.

1.7.d. Customer. -- The person or entity requesting installation of a Veteran's Marker at the grave of a deceased United States Veteran.

1.7.e. Permanent Care Fee. -- A Service Provider charge to a Customer to pay for perpetual care of an installed Veteran's Marker.

1.7.f. Service Provider. -- Any cemetery, cemetery association, cemetery company, and perpetual care cemetery company, irrespective of how each may be defined in W. Va.. Code §§ 35-5-1 et seq., 35-5A-1 et seq. and 35-5B-1 et seq., and any company that sets and installs memorial monument markers, that operates within the State of West Virginia, and provides Customers with installation and/or perpetual care of Veterans' Markers.

1.7.g. Stone slab. -- A granite or marble slab measuring no more than 28" by 16" on its face, and 4" high.

1.7.h. Veteran's Marker. -- means a 24" by 12" bronze grave memorial marker provided by

the United States Department of Veterans Affairs.

§150-28-2. Prices.

2.1. Price ceilings.

2.1.a. Basic Installation. -- A Service Provider may charge a Customer no more than \$50.00 for Basic Installation of a Veteran's Marker.

2.1.b. Stone Installation. -- A Service Provider may charge a Customer no more than \$200.00 for Stone Installation.

2.1.c. Stone Purchase Installation. -- A Service Provider may charge a Customer no more than \$380.00 for Stone Purchase Installation, including purchase of stone for a Veteran's Marker.

2.1.d. Permanent Care Fee. -- For purposes of these rules, when a cemetery, cemetery association, cemetery company, or perpetual care company, does not charge a pre-paid perpetual care fee for all grave sites, the price ceilings set forth herein are deemed to include costs for perpetual care of Veterans' Markers. A Service Provider may not assess a separate or periodic permanent care fee for care of a Veteran's Marker over and above a permanent care fee that would otherwise be applicable for a grave site.

2.1.e. The price ceilings set forth herein do not preclude the addition of legally applicable incremental, revenue based taxes, which are submitted by a Service Provider to a state or local taxing entity.

2.2. Price Schedules.

2.2.a. A cemetery, cemetery association, cemetery company, or perpetual care company shall, at the time a cemetery lot is purchased, provide the lot purchaser with a schedule setting forth the price ceilings stated herein for installation of Veterans' Markers and a price schedule showing permanent care fees applicable to grave sites.

2.2.b. Within thirty (30) days of the effective date of these rules, all cemeteries, cemetery associations, cemetery companies, and perpetual care companies shall have provided all owners of unused cemetery lots as reflected in the records of the Service Provider, with a schedule setting forth the price ceilings stated herein for installation of Veterans' Markers and a price schedule showing permanent care fees applicable to grave sites.

2.2.c. No later than July 1 of each year, all cemeteries, cemetery associations, cemetery companies, and perpetual care companies shall file with the Commission a schedule showing permanent care fees applicable to grave sites.

§150-28-3. Discrimination.

3.1. Service Providers shall not discriminate against customers requesting the installation of Veterans' Markers pursuant to these Rules by requiring terms and conditions of service, or additional fees, that would not be equally applicable to other customers.

§150-28-4. Petitions for Relief.

4.1. Any customer aggrieved by a Service Provider's alleged failure to comply with these Rules may file a signed petition requesting Commission review of the alleged non-compliance.