

**West Virginia Higher Education Policy Commission
Meeting of August 24, 2018**

ITEM: Approval of Revisions to Series 4, Procedural Rule, Rules and Administrative Procedures

INSTITUTIONS: All

RECOMMENDED RESOLUTION: *Resolved*, That the West Virginia Higher Education Policy Commission approves the revisions to Series 4, Procedural Rule, Rules and Administrative Procedures, to be filed with the Secretary of State.

STAFF MEMBER: Candace Kraus

BACKGROUND:

At its meeting of June 22, 2018, the Commission approved revisions to Series 4, Procedural Rule, Rules and Administrative Procedures. With the enactment of House Bill 2815 in 2017, the authority and involvement of the Commission in the promulgation of rules by the governing boards was changed, minimizing oversight of the rules enacted by the exempted schools and limiting oversight of the rules enacted by the remaining governing boards. Series 4 sets out the rule-making procedures for those schools under the jurisdiction of the Commission.

During the thirty-day public comment period, the following comments were received:

Comment: I understand that some of the HEPC's proposed changes to 133CSR4 are necessary to comply with 2017 HB 2815, which once again exempts certain higher ed institutions from certain HEPC regulation and oversight. However, in a couple of places the changes are unwarranted and even enable violation of WV code. Further, this is also an (sic) great opportunity to change other parts of this rule to clarify and better fulfill the HEPC's duty in "Assisting governing boards to carry out their duty effectively to govern the individual institutions of higher education;" (WV Code §18B-1B-4(a)(3)(B) and to "...guide the development of rules made by the governing boards, including a process for comment by the commission as appropriate... The rules promulgated by the exempted schools, the commission and council shall include, but are not limited to, the following provisions which shall be included in the rule on rules adopted by each governing board of a state institution of higher education..." (WV Code §18B-1-6(c)(3)

The general nature of my comments regarding this proposed rule relate to WV open-meeting law of WV Code §6-9A, the WV Freedom-of-information-Act of WV Code §29B, and the general rule-making requirements for all state institutions of WV Code §29A-1. These articles of code are fundamental to democratic governance and public sovereignty in West Virginia and must not be minimized, marginalized or preempted by this or any

agency's rules. WV Code §29A-3A and §18B describe requirements specific to Higher Education that work with but do not supersede the former three articles. (See eg. §29A-1-4. Application of open governmental proceedings law – "All meetings of an agency... for the purpose of making a decision or deliberating toward a decision as to the form and substance of a rule... are subject to the open governmental proceedings law..." or §29A-1-3(b) Application of chapter; limitations - "...That the rules promulgated by the state colleges and universities shall only be filed with the higher education [commission or council]...") The wording of WV Code §29A-3A and §18B must not be interpreted to exclude higher ed institutions from following WV Code §6-9A, §29B, or §29A-1.

No governing board of any state institution should feel entitled, privileged or justified in any way, even their own expediency, to be excluded from these laws that protect the public's right to understand, oversee, scrutinize and be notified of and involved in the rule-making of those who have accepted the invitation of our elected governor to serve on these governing boards as servants to the public. Nor should the HEPC feel the need or pressure to enable this wrong-headed attitude with a minimalist interpretation of these laws. Such a tradition of public fear and "non-disclosure" in our public agencies has, unfortunately, become the customary pattern and practice of many state and local agencies, particularly BOG's, and has damaged the public's sovereignty, trust, and ability to assume its own active participations in our representative governance. Empowering the public and the four-year institutions' constituents and other interested parties ought to be duties of the HEPC, especially since the HEPC is responsible for the "higher learning" of the state.

Response: The comments are beyond the scope of establishing guidelines for the process of promulgating rules and administrative procedures. The proposed rule is compliant with the authorizing statute, W.V. Code §18B-1-6.

Comment: Statements such as that found in the introduction of the open-meeting act help us see more clearly the legislative intent and purpose of law and understand that which is implicitly as well as explicitly required. WV Code §6-9A-1 states - "...The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them... The people insist on remaining informed so that they may retain control over the instruments of government created by them... Open government allows the public to educate itself about government decision-making through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government... Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs..." The HEPC should not choose to ignore the fully meaning of the law and guide BOG's toward as minimal a standard as one can get away with. I ask the Chancellor and HEPC to understand the law fully and guide the BOG's toward the maximum of public rights allowable, thereby

fulfilling the stated purposes of these laws.

Response: Consistent with statutory rule-making requirements, the proposed rule requires a thirty-day public comment period prior to final approval of any rule by a governing board.

Comment: The following are my suggested amendments to the proposed TITLE 133 PROCEDURAL RULE that will emphasize and better guide the BOG's to understand and comply with what is already required in state code, but has long been neglected or misunderstood, to the detriment of West Virginia. Please consider these suggestions well and implement them as seems best to you to best accommodate their intent. Further comments are interspersed throughout the proposed rule as needed and relevant to my suggested changes.

Response: Each comment provided has been analyzed and considered for amendment.

Comment: Recommends changing references to the West Virginia Code from "code" to "WV code" throughout. I appreciate the apparent intent of the HEPC in adding the word "code" to 3.4, although it would be much better if each proposed amendment were accompanied by a statement of reason and, e.g. explaining the facts, need and merit for the decision to add "code", especially since it has large legal ramifications and confirms what I've said in Comment 1. Some of my suggestions below involve just that for the BOG's.

Response: Changing references from "code" to "WV code" would add clarity to the rule and staff recommends that this change be accepted.

Comment: My additions above, including the addition of 1.6. Other Applicable WV Code, necessarily clarify and strengthen the HEPC's addition of the word "code".

Response: The suggested additional WV Code references are beyond the scope of the authorizing statute for the proposed rule, WV Code §18B-1-6.

Comment: Recommends modifying §133-4-4. Rulemaking Process, to read as follows: 4.1. Consultation. Institution officers are ~~encouraged~~ required to consult with interested groups before presenting a proposed rule to the governing board for consideration. All facts, opinions and other information and evidence gathered for the purpose of determining need, form and content, criteria for sufficiency in meeting need and merit of a proposed rule or its amendment or repeal shall be considered public record and shall be written, recorded and filed according WV Code. Recent amendments to W.Va. Code §18B-9A-7(c) in 2018 House Bill 2542 and other code make it a requirement rather than an option to consult with interested parties during at least some rule-making. Why "encourage" BOG's to get away with less than the legal minimum of constituent involvement by the BOG's? They should know that they are required to do so and be guided to always consult with interested groups.

Response: *Institutions are not required by law to consult with interested groups prior to governing board consideration, and the thirty-day public comment period provides an opportunity for input prior to final adoption by the board.*

Comment: All determinations of proposed institutional need and policy merit, sufficiency and readiness for approval (“form and substance” in §29A-1-4) are “decisions” under §6-9A-1(1) and §29A-1-4 and are required to be made in open meeting under §6-9A-3. For example, §29A-1-4 states, “(a) All meetings of an agency, board or commission of the executive branch of government or of the legislative rule-making review committee which may only be convened upon the presence of a required quorum, and which are convened for the purpose of making a decision or deliberating toward a decision as to the form and substance of a rule, as defined in subsection (i), section two of this article, are subject to the open governmental proceedings law as set forth in article nine-a, chapter six of this code...” The BOG’s should be guided to share all their information with the public and constituents so the law and its purpose stated in §6-9A-1 can be better fulfilled.

Response: *The comments are beyond the scope of the proposed rule.*

Comment: Currently many BOG’s have a habit of not sharing the information they use to make their rule-making determinations and other decisions with the public. This information is considered public domain and should be written down and recorded so the public can have access to it.

Response: *The comments are beyond the scope of the proposed rule.*

Comment: To avoid dealing with the public or giving out information, operating like private boards with “non-disclosure agreements”, many BOG’s simply don’t write things down or deliberately don’t communicate by written messages such as e-mails. They rely instead on “informal” oral meetings in private to consider information and make determinations, believing the law allows them to get away with this. Governing boards must not be allowed to continue this practice of avoiding FOIA duties (WV §29B) by simply failing to make written record of facts, information and other evidence that the public has a right to have access to, and thus feeling justified making deliberations toward determinations informally in private, such as between a designated board member and staff. The HEPC should guide, and then use its authority if necessary to ensure compliance with the law.

Response: *The comments are beyond the scope of the proposed rule. Additionally, government officers and employees are not required by law to document or record all deliberations or communications, as such would be extremely inefficient, unduly burdensome, and completely unnecessary.*

Comment: This pattern and attitude of hiding rule-making from the public is illustrated by the recent rule-make of FSU’s BOG Policies 63, 64 and 65. The information gleaned from numerous meetings between HR administration and the staff last year was not written down and recorded. (See Response to Hansen FOIA Request.) Rather, the

information was shared orally with a few board members in several unrecorded private “informal” meetings. All deliberations and determinations regarding the policies’ needs, merit and readiness for filing and public notification were made in private by individual members, or even by the president, with almost none of the gathered facts, evidence, or constituent input regarding the policies being shared with the other BOG members. Thus, the BOG’s decision to “approve” the policies was uniformed, indefensible and unlawful.

Response: The comments are beyond the scope of the proposed rule. Consistent with statutory rule-making requirements, the proposed rule requires a thirty-day public comment period prior to final approval of any rule by a governing board. Additionally, government officers and employees are not required by law to document or record all deliberations or communications, as such would be extremely inefficient, unduly burdensome, and completely unnecessary.

Comment: Making these determinations in private before presenting a completed version of the proposed rule for public comment, without the public witnessing the deliberation of rule-making or understanding the reasons for the proposed rules, amendments, or repeals, is a violation of duty, ethics, trust public sovereignty and WV law that is actually commonly made by many governing boards. I urge you to please include wording that will help guide BOG’s away from this habitual perspective, pattern and practice of avoiding scrutiny and maintaining an elitist sense of entitlement that avoids the public and sees the public as the “problem”.

Response: Consistent with statutory rule-making requirements, the proposed rule provides an opportunity for public input by requiring a thirty-day public comment period prior to final adoption of any rule by a governing board.

Comment: Recommends inserting the following in §133-4-4.2:

Determination and Approval of Proposed Notice and Rulemaking.

4.2.a. To determine that a rule concerning a subject matter under the governing board’s jurisdiction should be adopted, amended, or repealed, the governing board is required by law to:

(1) Record and store as written public record all fact-finding and other evidence gathered and considered by the governing board when determining the need, content, and criteria for sufficiency in meeting the determined need and merit of the proposed policy or its amendment or repeal;

(2) Meet in formal open meeting as a quorum to consider said facts and other evidence and deliberate in public toward the determination of need, content, criteria for sufficiency, merit, and other determinations necessary for the preparation and approval of a proposed rule or amendment or its repeal;

(3) Provide the facts and other evidence to the public in the meeting agenda;

(4) Record the determinations and main points of discussion, pro and con, in the meeting minutes;

(5) Provide a clear, succinct written statement of rationale for the determination of adoption, amendment or repeal of the policy to be posted in meeting minutes, posted with

public notification of comment request, and submitted with filing of notification with the HEPC, together with the facts and other evidence gathered and considered by the governing board.

(6) Provide maximum public openness and understanding that the law allows under WV §6-9A rather than the minimal it can be construed to require.

Determinations of need, criteria for sufficiency in meeting those needs, merit and other “form and substance” are decisions that must be made before a rule is ready for public notification and filing with the HEPC. It would be greatly helpful to the institutions for their BOG’s to view and practice these determinations as decisions that require public involvement before a rule’s formal approval. Unlike the public’s option to avoid participation in the Primaries and merely vote in the general election for a candidate chosen for them., the BJOG’s are duty-bound to participate fully in the deliberations and determinations of rule-making before approving a policy. These steps of first determination, then approval for public comment will improve each BOG’s rule-on-rules and guide them to greater transparency, personal knowledge and accountability as board members, better decisions and policies, greater honesty and respect for the public and the university constituents whom they serve.

Response: The comments are beyond the scope of the proposed rule. Consistent with statutory rule-making requirements, the proposed rule requires a thirty-day public comment period prior to final approval of any rule by a governing board. Additionally, government officers and employees are not required by law to document or record all deliberations or communications, as such would be extremely inefficient, unduly burdensome, and completely unnecessary.

Comment: Each suggested step above merely involves a more public-oriented understanding of existing code, and will enable the BOG’s to better understand the various parts of pertinent and controlling “WV code”, especially in light of the HEPC’s new addition of “code” in Section 3.4.

Response: The comments are beyond the scope of the proposed rule.

Comment: Recommends modifying §133-4-4.2 to read as follows:

4.2.b. If ~~When~~ a governing board determines that a rule ~~concerning a subject matter under the governing board’s jurisdiction~~ should be adopted, amended, or repealed, the governing board ~~should~~ shall approve a notice of proposed rulemaking to be filed with the Commission. A notice of proposed rulemaking shall ~~should~~ include at least:

(1) The fact-finding and other evidence used by the governing board in making its determinations in open meeting during the rule-making process and stored as public record;

(2) A brief description of the subject matter of the rule, the statements of determinations and their rationale, an explanation of how comments will be received, the deadline for receiving comments, and contact information for the person who has been designated to receive comments; and

(3) A copy of the proposed rule if adoption or amendment is proposed or a copy of the current rule if repeal is proposed. This rule should use the word “shall” rather than “should” or “may” because the WV code already exists to require this, if understood and applied; it isn’t the HEPC requiring it. The HEPC need not feel compelled to soften the wording in response to its own diminished authority of 2017 HB 2815. Rather, it is the WV law itself that is requiring these things, and the HEPC is merely doing its duty to enlighten and guide the BOG’s so they don’t step on the law and violate their obligations and commitments to the public and their institutions. Please help them stop doing this by implementing some form of these additional steps in the rule.

Response: Suggestions to change “should” to “shall” are consistent with statutory requirements and staff recommends that this change be approved.

Comment: This step of approving a rule for notification of public comment and filing with the HEPC again guides the BOG’s toward greater transparency, accountability, honesty and respect for the public and the university constituents whom they serve. The public needs these facts and statements of determination and rationale so we can comment knowledgeably and effectively on proposed rule and the facts, evidence and reasons behind them.

Response: As this proposed rule provides for governing boards to submit notice of proposed rule-making to the Chancellor, such notice is effectively also notice to the Commission.

Comment: It is so important a BOG not abdicate its rule-making authority to administration or authorize a board member to make all rule-making determinations in private in consultation with administration, and then simply vote on the proposed rule as it is placed on the meeting agenda, without consideration of the facts and evidence used in private to make the needed determinations. This is what the FSU BOG has done routinely, including during the making of its Policies 63-65, and what other BOG’s do also.

Response: The comments are beyond the scope of the proposed rule.

Comment: Recommends modifying §133-4-4.3 through §133-4-4.5.b to read as follows:
4.3. Notice of Proposed Rulemaking. Notices of proposed rulemaking shall ~~should~~ be provided directly to the Chancellor, those persons representing students, faculty, and staff at the institution, and other interested parties. In addition, notices of proposed rulemaking shall be posted prominently at a location or locations accessible to the public and identified in the institution’s rule on rules, as well as posted on the institution’s website, and copies should be made available at no cost to any requester.

4.4. Comment Period. Except for emergency rules, a notice of proposed rulemaking must provide for a public comment period of at least thirty (30) days during which written comments will be received before final adoption of the rule. A President or governing board may also provide for a public hearing.

4.5. Approval of Final Rule.

4.5.a. If a governing board originally properly approved a notice of rulemaking at a

previous meeting and no comments are received during the comment period, a proposed rule need not be re-approved by the governing board if the board provides so at the time it approves the proposed rule.

4.5.b. If written comments are received or a hearing held during the comment period, the governing board shall ~~should~~ summarize the comments received and/or made and make a written determination concerning each issue raised that includes a full statement of rationale for the determination, to be included in the agenda of and considered in the meeting in which the governing board approves the rule for final filing with the Commission. The governing board may amend a proposed rule as a result of the comments or evidence received. Any amendment shall be accompanied by a written explanation that includes reference to the corresponding recorded evidence for the amendment and the reasoning for its determination. All written comments and evidence received, and determinations with explanations made by the governing board shall ~~should~~ be made available in the manner set out in Section 4.3 of this rule at least ten (10) days prior to the meeting in which the governing board gives final approval to the rule and be carefully preserved by the institution and open for public inspection and copying for a period of at least five (5) years from the date of final board action, and shall be considered in during (sic) the meeting before the vote for final approval. Once again, this step of final approval and filing the rule with the HEPC for its comments includes public documentation of the determination and reasons for the final approval and any amendments therein based on public comments and the BOG's deliberations of the comments and other new evidence in the meeting minutes.

Response: Government officers and employees are not required by law to document or record all deliberations or communications, as such would be extremely inefficient, unduly burdensome, and completely unnecessary. Suggestions to change "should" to "shall" are consistent with statutory requirements and staff recommends that this change be approved.

Comment: Again, the BOG must not lazily allow individual board members to make all determinations of rule-making in private, then simply move to approve the rule in public meeting without consideration of the facts and evidence available for the public to observe and understand.

Response: The comments are beyond the scope of the proposed rule.

Comment: Recommends modifying §133-4-4.3.c through §133-4-4.3.d to read as follows: 4.5.c. After final approval of the proposed rule, The the institution shall furnish the Chancellor or his/her designee with a copy of the final proposed rule at least fifteen (15) twenty five (25) days prior to the governing board's posting of the meeting agenda that includes formal adoption of the final rule.

~~4.5.d. Except as set forth in Section 4.5.f of this rule, any rule adopted by a governing board shall not be effective until reviewed and commented on by the Chancellor or his/her designee. The Chancellor or his/her designee shall notify the governing board of any specific or general objections and/or suggestions to the rule within fifteen (15) days of receiving the proposed rule and allow thereby allowing the governing board to consider~~

the comments at least ten (10) days prior to formal adoption of the proposed rule and make available the Chancellor's comments to the public in the agenda of the meeting wherein the board intends to address the objections and/or suggestions and approve the rule for adoption. The proposed rule may not become effective or implemented until the governing board places the Chancellors comments or suggestions on its agenda and considers them at a meeting of the governing board. If the Chancellor provides no comments before fifteen days, the rule may be adopted as finally approved. My amendment here combines 4.5 c, d, and f into one, making the rule easier to understand and less redundant.

Response: The proposed rule is consistent with statutory requirements in both the time periods provided and the requirement that the Chancellor's responses be included in the governing board's agenda.

Comment: Increasing the filing deadline to 25 days or so before final adoption is necessary to allow the BOG to notify the public of the HEPC's objections and/or suggestions, to put them in the meeting agenda and allow the public to observe in open meeting what the BOG chooses to do with them.

Response: The proposed rule is consistent with statutory requirements regarding time periods.

Comment: It is a violation of open-meeting laws to deliberate and make a determination or to amend the rule in private using the Chancellor's comments before adoption. This HEPC rule should guide the BOG's so they don't do this. If there are no comments from the HEPC, the public should be notified of such and the rule be formally adopted in open meeting as previously approved.

Response: The comments are beyond the scope of the proposed rule.

Comment: It is a violation of FOIA to not make public the final written comments of the HEPC and the written determinations and rationale used by the BOG to further amend or approve for adoption the rule. This HEPC rule should guide the BOG's so they record and share with the public those comments before adoption.

Response: The proposed rule is consistent with the statutory requirement that the Chancellor's responses be included in the governing board's agenda.

Comment: Again, each suggested step simply encourages a more public-oriented perspective of existing code, and will enable the BOG's to understand the various parts of pertinent and controlling WV code as they should, and thereby responsibly ensure that their policies are as good as they should be.

Response: The proposed rule is consistent with the authorizing statute.

Comment: This rule must not exempt any institution from dealing publicly with the public's

or the HEPC's comments. The objections and suggestions of the public and Chancellor are public record and considering them in private towards a decision is a violation of WV Code §6-9A. WV Code §18B must not be understood to impinge on §6-9A, §29B, or 29A-1, even for the expediency of an "exempted" board. Nor should any governing board feel free to simply ignore the Chancellor's comments. Whether the HEPC has weight or not, the public has a legal right to view the comments and scrutinize the board's use of them.

Response: The proposed rule is consistent with the authorizing statute and the exempt institutions are so designated by WV Code.

Comment: Please don't rely on public apathy or ignorance to appease certain institutions in the name of their expediency at the expense of the public and the institutions' constituents. These amendments will enable to HEPC to more easily and effectively use its authority and resources to train all our higher ed institutions to act more proactively and righteously in the interests of the public.

Response: The proposed rule is consistent with the authorizing statute.

Comment: Recommends modifying §133-4-4.5.e through §133-4-5.2 to read as follows:
4.5.e d. In situations where the governing boards of Marshall University and West Virginia University have been given authority that inherently requires the governing board to promulgate and adopt a rule, that authority is void until the governing board adopts a rule in a manner consistent with this rule and state code.

~~4.5.f. Any rule adopted by the governing boards of Marshall University or West Virginia University the exempted schools under West Virginia Code §18B-1-2 shall not be subject to Section 4.5.d. of this rule. Marshall University and West Virginia University However, the exempted schools shall submit their rules proposed rule to the Chancellor and the Chancellor shall submit any comments or suggestions to the governing board within thirty (30) fifteen (15) days of receipt of the proposed rule. Any comments or suggestions made by the Chancellor regarding a proposed rule by these two any governing boards of non-exempted schools may not become effective or implemented until the governing board places the comments or suggestions on its agenda and considers them at a meeting of the governing board. [all included in 4.5.c]~~

§133-4-5. Posting and Publication of ~~Approved~~ Formally Adopted Rules.

5.1. ~~Approved~~ Formally adopted rules shall be posted prominently at a location or locations identified in the institution's rule on rules, as well as on the institution's website, and copies shall be made available at no cost to any requester.

5.2. ~~Approved~~ Formally adopted rules shall be enumerated in a manner that makes them easily identifiable. Sections 4.2 and 4.5 designate Final Approval as the step before the Chancellor's comments, and Formal Adoption as the step after the Chancellor's comments. Using the term Approval here in §133-4-5 contradicts 4.2 and 4.5 and makes the rule steps confusing. The term Formally Adopted should be used here.

Response: The proposed rule is consistent with the authorizing statute.

Comment: Recommends inserting a new §133-4-8.4 to read as follows:

8.4. The Commission has authority under §18B-1B-4(c)(1) to object to a governing board's rule making procedures when they are found to be in violation of WV code, and may temporarily suspend a governing board's rule-making or other authority in order to bring the governing board into compliance with WV state law and reestablish sound, responsible institutional governance. This rule should remind BOG's of the authority and power the HEPC has to ensure that they follow the law. Certain institutions may be exempt from certain steps or requirements of the HEPC, but they cannot be exempt for the fundamental laws of openness, rule-making and public service. The HEPC remains authorized to hold all BOG's accountable for their actions in following the laws.

Response: *The comments are beyond the scope of the proposed rule.*

Comment: The HEPC should be up front about it's commitment to ensure that BOG's comply with the open-meeting, rule-making and information laws. The HEPC has often ignored and even abdicated to the public its power and responsibility to oversee and ensure, if necessary, BOG compliance with law and exercise of sound, responsible governance, relying instead on the public to complain in circuit court when a BOG violates the law. The addition of 8.4 would help the HEPC avoid such abdication and make its oversight duties more easily rendered and effective with deliberate addition of this authority in the rule.

Response: *The proposed rule is consistent with the authorizing statute.*

Staff recommends approval of the revised Series 4 for filing with the Secretary of State.