



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Coal Mine Health And Safety TITLE-SERIES: 36-08

RULE TYPE: Legislative Exempt Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: RULES AND REGULATIONS GOVERNING THE RIGHT OF A MINER TO REFUSE TO OPERATE ALLEGED UNSAFE EQUIPMENT

CITE STATUTORY AUTHORITY: W. Va. Code § 22A-6-4

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 11/25/2019 5:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Mallory Yates Hicks

ADDRESS: 106 Dee Drive
Charleston, West Virginia 25311

EMAIL: mallory.k.yates@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

The Series governs the right of a miner to refuse to operate alleged unsafe equipment.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

Pursuant to the regulatory review and reform initiatives established in West Virginia Code § 29A-3-20 (2016) and Executive Order No. 3-18, the proposed legislative-exempt rules modify and update Series 8 of Title 36 of the Code of State Rules to cross-reference the correct authorizing portions of the West Virginia Code, to reflect the appropriate designations for certain State and Federal agencies such as the Office of Miners Health, Safety, to correct several typographical errors in the Series to utilize the current citation formats, and to renumber provisions according to the outline required under W. Va. Code R. §153-1-5.22. & §153-1-6. Finally, the proposal rule eliminates authority within the rule for an attorney who is not authorized to practice law in West Virginia to appear in a hearing before the Director of the Office of Miners Health, Safety and Training.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The proposed legislative-exempt rule is not anticipated to impact the revenues of State Government. The proposal simply updates Series 8 of Title 36 of the Code of State Rules to reflect proper citations to the West Virginia Code, the proper names of certain State agencies, and the current citation and numbering formats pursuant to the regulatory review and reform initiatives established in West Virginia Code § 29A-3-20 (2016) and Executive Order No. 3-18.

B. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

The proposed legislative-exempt rule is not anticipated to economically impact the State or its residents. The proposal simply updates Series 8 of Title 36 of the Code of State Rules to reflect proper citations to the West Virginia Code, the proper names of certain State agencies, and the current citation and numbering formats pursuant to the regulatory review and reform initiatives established in West Virginia Code § 29A-3-20 (2016) and Executive Order No. 3-18.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2019 Increase/Decrease (use "-")	2020 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs and Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

The proposed legislative-exempt rule is not anticipated to have a fiscal impact.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Wesley H White -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 36
LEGISLATIVE RULE
BOARD OF COAL MINE HEALTH AND SAFETY

SERIES 8
RULES AND REGULATIONS GOVERNING THE RIGHT
OF A MINER TO REFUSE TO OPERATE ALLEGED UNSAFE EQUIPMENT

§36-8-1. General.

1.1. Scope. -- Rules and regulations governing the right of a miner to refuse to operate alleged unsafe equipment.

1.2. Authority. -- W. Va. Code ~~'22-6-4.~~ §22A-6-4.

1.3. Filing Date. -- ~~October 8, 1980.~~

1.4. Effective Date. -- ~~December 1, 1980.~~

§36-8-2. Definitions.

2.1. As used in this series:

(a) 2.1.1. Unsafe Equipment: The term "Unsafe Equipment" shall mean any equipment designed to be operated by a miner that has a defect which is covered by state law, or rule or regulation, and that creates a condition which involves a potential hazard that could reasonably be expected to cause a miner in the vicinity to be placed in danger of injury or death.

(b) 2.1.2. Safety representative: The term "Safety Representative" shall mean any safety representative of the miners at the mine affected.

§36-8-3. No Miner Shall Be Required To Operate Unsafe Equipment.

3.1. Miner's procedure when equipment is believed to be unsafe-When a miner believes the equipment he or she is operating, or is assigned to operate, is unsafe, the miner shall cease or refuse to operate the alleged unsafe equipment and promptly inform his or her immediate supervisor as to the identity of the alleged unsafe equipment and the particular alleged defect causing the equipment to be unsafe.

§36-8-4. Equipment Examination: Immediate Supervisor-Miner.

4.1. Prior to the alleged unsafe equipment being placed back into operation after a miner has alleged it to be unsafe, the immediate supervisor shall examine, or have examined by maintenance personnel, the alleged unsafe equipment with regard to each alleged defect noted by the miner. If the alleged defects are corrected the equipment may be placed back into operation.

§36-8-5. Dispute Procedures: Immediate Supervisor-Miner.

~~5.1.~~

(a) 5.1. When the immediate supervisor fails to have the alleged defects corrected, the alleged unsafe equipment may be parked in a manner that will allow the movement of other equipment; and the alleged unsafe equipment shall be de-energized, locked-out, and suitably tagged so as to keep the alleged unsafe equipment from being operated by any person.

(b) 5.2. No miner shall be discriminated against for refusing to operate alleged unsafe equipment.

§36-8-6. Operator's Procedure If Dispute Remains Unsettled.

~~6.1.~~

(a) 6.1. If the allegations of the miner are disputed, the immediate supervisor shall notify at least one safety representative and a maintenance foreman, who shall inspect and/or test the alleged unsafe equipment within four (4) hours after notification to determine if the alleged defect exists. If the safety representative and the maintenance foreman find that the alleged defect does exist, the defect shall be corrected before the equipment is placed back into operation; if no defect is found, the equipment can be placed back into operation.

(b) 6.2. If the safety representative and the maintenance foreman disagree as to the alleged defect, they shall reduce to writing in detail the results of their inspection and/or test of the alleged unsafe equipment on a form, and in the manner, prescribed by the Director of the ~~Department of Energy~~ Office of Miners' Health, Safety and Training. The form shall contain at least the date and time of the inspection and/or test, description and location of the alleged unsafe equipment and the detailed results of the inspection and/or test.

§36-8-7. Inspection: ~~Department of Energy~~ Office of Miners' Health, Safety and Training.

~~7.1.~~

(a) 7.1. At the conclusion of the steps outlined in Sections 4, 5 and 6 of ~~these Rules and Regulations of this Series~~, the operator or his representative shall immediately notify the Director or the authorized representative requesting an investigation of his allegations of unsafe equipment. Upon receiving a request to investigate from an operator or his representative, the Director or his authorized representative shall immediately inform the operator when an inspection of the alleged unsafe equipment can be made by the Director of ~~Energy~~ the Office of Miners' Health, Safety and Training: *Provided*, That such investigation shall be started within twenty-four (24) hours after the ~~Department of Energy~~ Office of Miners' Health, Safety and Training is requested to investigate. The operator or his representative shall give notice of the investigation time and place to the immediate supervisor and the miner involved in the dispute. The miner shall be given reasonable time to notify his or her safety representative, if he or she so chooses, in order that they may participate in the inspection.

(b) 7.2. A qualified authorized representative of the Director shall be at the place set for inspection at the time designated in order to conduct an investigation of the alleged unsafe equipment. Prior to inspecting the alleged unsafe equipment, the authorized representative of the Director shall read the form required to be completed in Section 6.1.(b) of ~~these Rules and Regulations of this Series~~. The authorized representative of the Director shall inspect and/or test the alleged unsafe equipment and enter the results thereof on a form and, in the manner, prescribed by the Director. The authorized representative's conclusions as to whether or not the equipment was "unsafe equipment" shall be entered on the form, along with the reasons for such conclusion. At the conclusion of the investigation, the authorized representative

of the Director shall discuss the results of the investigation with, and in the presence of, the miner, the miner's safety representative if the miner so chooses, the immediate supervisor, the maintenance personnel involved in the dispute, the mine foreman and/or superintendent.

(e) 7.3. If the authorized representative of the Director finds the equipment involved in the dispute to have a defect which is covered by state law, or rule or regulation, appropriate notices and/or orders shall be issued; which notices and/or orders shall be complied with prior to the subject equipment being placed back into operation.

§36-8-8. Decision By The Director Or The Deputy Director As To Whether Or Not The Miner Acted With Good Faith And With Good Cause.

~~8.1.~~

(a) 8.1. When the operator believes the miner involved in the dispute acted in bad faith and without good cause, the operator may make application to the Director charging the miner with having acted in bad faith and without good cause and requesting a determination of such charge: *Provided*, That such charge is made within five (5) days of the alleged dispute.

(b) 8.2. The operator's application charging the miner shall be mailed by certified mail to the Director, the charged miner, and the safety representative, if any.

~~8.2.~~ 8.3. Upon receiving a charge from an operator, the Director shall promptly cause such investigation as he deems appropriate and schedule a hearing within twenty (20) days after receiving the charge, allowing the operator and the miner an opportunity to be heard.

(a) 8.3.1. Notice of hearing; Contents of notice.

(1) 8.3.1.a. Unless waived by the operator and the miner involved in the dispute, no hearing shall be conducted under ~~these Rules and Regulations~~ Section 8 of this Series unless the miner and operator shall have received at least ten (10) days' written notice.

(2) 8.3.1.b. Each written notice of the hearing shall contain the date, time and place of the hearing and a short and plain statement of matters which are to be the subject of or asserted at the hearing. Such notice shall be given by certified mail.

(b) 8.3.2. Date, time and place of hearing. The date, time and place of the hearing shall be determined by the Director.

(e) 8.3.3. Representation at hearings. The miner involved ~~involved~~ in the dispute may represent himself, be represented by a safety representative or be represented by an attorney ~~at law admitted to practice before the courts of any state or the District of Columbia~~ duly authorized to practice law in West Virginia. The operator may be represented by a full-time employee or an attorney ~~at law admitted to practice before the courts of any state or the District of Columbia~~ duly authorized to practice law in West Virginia.

(d) 8.3.4. Applicability of Administrative Procedures Act. All of the pertinent provisions of ~~Article 5, Chapter 29A of the West Virginia Code W. Va. Code §§29A-5-1 et seq.,~~ shall apply to and govern hearings conducted under ~~these Rules and Regulations~~ Section 8 of this Series with like effect as if the

provisions of ~~said Article 5~~ W. Va. Code §§29A-5-1 et seq., were set forth herein. If any provision of these rules of practice and procedure contained in Section 8 ~~herein~~ of this Series are inconsistent with any pertinent provisions of ~~said Article 5~~ W. Va. Code §§29A-5-1 et seq., the provisions of ~~said Article 5~~ W. Va. Code §§29A-5-1 et seq., shall control.

(e) 8.3.5. Waiver of evidentiary presentation.

(+) 8.3.5.a. Any party who desires to submit written pleadings, comments or information in lieu of an evidentiary hearing may submit such documents prior to the hearing date, for the Director's or Deputy Director's, as the case may be, consideration in the matter in the event hearing is waived as provided in subsection (e) (2) of this Section.

(-) 8.3.5.b. Parties entitled to an evidentiary hearing may waive such right in writing, but unless all entitled parties file timely waivers, a hearing will be conducted. Such waivers must be unequivocal and request the Director or Deputy Director, as the case may be, to decide the matter at issue on the materials submitted in subsection (e) (1) of this Section and any stipulations the parties might enter into.

(-) 8.3.5.c. When a hearing is waived under the provisions of this subsection, the written record in the case shall be submitted to the Director or Deputy Director, as the case may be, for decision.

(f) 8.3.6. Burden of proof. In proceedings under ~~these Rules and Regulations~~ this Series, the operator making application to the Director under subsection ~~8.1. (a) of this Section~~ 8.1.1 of this Series shall have the burden of proving his case by a preponderance of the evidence.

(g) 8.3.7. Proposed findings, conclusions and orders. The Director or Deputy Director, as the case may be, may request the submission by parties of the proposed findings of fact, conclusions of law and orders, together with a supporting brief: *Provided*, That such documents shall be submitted within twenty (20) days after their request. Such proposals and briefs shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

(h) 8.3.8. Hearings to be public. All hearings conducted under ~~these Rules and Regulations~~ Section 8 of this Series shall be open to the public.

(i) 8.3.9. Decisions and orders.

(+) 8.3.9.a. Within twenty (20) days after conclusion of the hearing and submission of the all documents or after submission of the case and consideration of the record as a whole in the event a hearing is waived, the Director or Deputy Director, as the case may be, shall render a decision and order which shall be in writing and shall include a statement of (a) findings and conclusions, and the reasons or basis therefore on the material issues of fact and law and (b) the appropriate ruling or order granting, granting in part or denying the relief sought.

(-) 8.3.9.b. A copy of all decisions and orders shall be served, by certified mail, upon all parties and, unless the decision and/or order provides, the decision and order so served shall become effective immediately following service.