IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

_____

No. 22226

_____

STATE OF WEST VIRGINIA EX REL. DARRELL E. HOLMES,
CLERK OF THE SENATE OF WEST VIRGINIA, AND
DONALD L. KOPP, CLERK OF THE HOUSE OF
DELEGATES OF WEST VIRGINIA,
Relators

v.

GLEN B. GAINER III, AUDITOR OF THE
STATE OF WEST VIRGINIA,
Respondent
and
THE HONORABLE HERMAN CANADY,
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA,
Respondent

DONNA J. BOLEY AND ROBERT P. PULLIAM, M.D.,
Intervenors

Petition for Writs of Mandamus and Prohibition

WRITS GRANTED

Submitted: June 7, 1994
Filed: July 20, 1994

Joseph R. Goodwin
Debra C. Price
Goodwin & Goodwin
Charleston, West Virginia
Attorneys for the Relators

James B. Lees, Jr.
Hunt, Lees, Farrell & Kessler
Charleston, West Virginia
Attorney for the Intervenors

Silas B. Taylor
Senior Deputy Attorney General
Charleston, West Virginia
Attorney for the Respondent

JUSTICE MILLER delivered the Opinion of the Court.

CHIEF JUSTICE BROTHERTON and JUSTICE NEELY dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, Winkler v. State School Building Authority, 189 W.cVa. 748, 434 S.E.2d 420 (1993).

2. "'"In ascertaining legislative intent, effect must be given to each part of the statute and the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975).' Syl. Pt. 3, State ex rel. Fetters v. Hott, 173 W. Va. 502, 318 S.E.2d 446 (1984)." Syllabus Point 3, Jeffrey v. Jeffrey, 188 W. Va. 476, 425 S.E.2d 152 (1992).

3. Section 33 of Article VI of the West Virginia Constitution allows the Citizens Legislative Compensation Commission to meet as often as necessary. However, Section 33 restricts the Commission from submitting to the Legislature its resolution on compensation and expense allowances except on a quadrennial basis calculated from the 1971 legislative session.

4. "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions." Syllabus Point 5, Bradley v. Appalachian Power Co., 163 W.cVa. 332, 256 S.E.2d 879 (1979).

5. Based upon our general principles of retroactivity of judicial opinions, the legislative compensation and expense allowances contained in House Bill 4031 are not invalid.

Miller, Justice:

The relators, Darrell E. Holmes, Clerk of the Senate of West Virginia, and Donald L. Kopp, Clerk of the House of Delegates of West Virginia, on April 5, 1994, filed this original petition for a writ of mandamus against the respondent, Glen B. Gainer III, Auditor of the State of West Virginia, and for a writ of prohibition against the respondent, the Honorable Herman Canady, Judge of the Circuit Court of Kanawha County. Subsequently, we permitted Donna J. Boley and Robert P. Pulliam, M.D., to appear as intervenors and gave them the right to take depositions and to file interrogatories. This matter was set for a full hearing on June 7, 1994.

The relators seek a writ of mandamus to compel the State Auditor to perform his statutory duty to issue warrants for the payment of salaries and expenses for the members of the Legislature and others pursuant to House Bill 4031 (Bill). This Bill was passed by the West Virginia Legislature during the 1994 session. The State Auditor is authorized to issue warrants for the payment of legislative compensation and expense allowances pursuant to W. Va. Code, 12-3-1 (1990), and W. Va. Code, 12-3-5 (1923). At issue is the validity of the legislative pay raise contained in the Bill. The Auditor contends that the procedures used in adopting the Bill

did not conform to the requirements of Section 33 of Article VI of the West Virginia Constitution relating to pay raises for members of the West Virginia Legislature.

The relators also sought a writ of prohibition ordering Judge Canady to refrain from hearing a declaratory judgment action currently pending in the circuit court which basically involves the same matters at issue in this case. In the alternative, they asked that the circuit court proceeding be stayed pending resolution of this petition.

Section 33 of Article VI of the West Virginia Constitution established a Citizens Legislative Compensation Commission (Commission) and vested the Commission with the authority to submit to the West Virginia Legislature its resolution determining

[1]On March 23, 1994, Senator Donna J. Boley and Delegate Robert P. Pulliam, M.D., filed a declaratory judgment action in the Circuit Court of Kanawha County against the Honorable Larrie Bailey, Treasurer of the State of West Virginia (Civil Action No. 94-C-529). In the declaratory judgment action, the plaintiffs requested that the circuit court declare W. Va. Code, 4-2A-1, et seq., as amended by the Bill, unconstitutional or void as to the legislative pay raises. By letter dated April 4, 1994, the State Auditor informed the relators that he would refuse to issue warrants for payments to be made pursuant to the Bill, pending a final judicial determination of the constitutionality of the legislative pay raises. Judge Canady voluntarily stayed proceedings in his court pending resolution of the issues by this Court.

compensation and expense allowances for members of the Legislature.

On March 3, 1994, the Commission endorsed a "Resolution Submitting

---

[2]Section 33 of Article VI of the West Virginia Constitution provides:

> "Members of the legislature shall receive such compensation in connection with the performance of their respective duties as members of the legislature and such allowances for travel and other expenses in connection therewith as shall be (1) established in a resolution submitted to the legislature by the citizens legislative compensation commission hereinafter created, and (2) thereafter enacted into general law by the legislature at a regular session thereof, subject to such requirements and conditions as shall be prescribed in such general law. The legislature may in any such general law reduce but shall not increase any item of compensation or expense allowance established in such resolution. All voting on the floor of both houses on the question of passage of any such general law shall be by yeas and nays to be entered on the journals.
>
> "The citizens legislative compensation commission is hereby created. It shall be composed of seven members who have been residents of this State for at least ten years prior to the date of appointment, to be appointed by the governor within twenty days after ratification of this amendment, no more than four of whom shall be members of the same political party. The members shall be broadly representative of the public at large. Members of the legislature and officers and employees of the State or of any county, municipality or other governmental unit of the State shall not be eligible for appointment to or to serve as members of the commission. Each member of the commission shall serve for a term of seven years, except of the

Recommendations with Respect to Compensation and Expense Allowances." The resolution was submitted to the West Virginia Legislature at its regular session on March 3, 1994, the same date it was adopted by the Commission.

---

members first appointed, one member shall be appointed for a term of one year, and one each for terms ending two, three, four, five, six and seven years after the date of appointment. As the term of each member first appointed expires, a successor shall be appointed for a seven-year term. Any member may be reappointed for any number of terms, and any vacancy shall be filled by the governor for the unexpired term. Any member of the commission may be removed by the governor prior to the expiration of such member's term for official misconduct, incompetency or neglect of duty. The governor shall designate one member of the commission as chairman. The members of the commission shall serve without compensation, but shall be entitled to be reimbursed for all reasonable and necessary expenses actually incurred in the performance of their duties as such members.

> "The commission shall meet as often as may be necessary and shall within fifteen days after the beginning of the regular session of the legislature in the year one thousand nine hundred seventy-one and within fifteen days after the beginning of the regular session in each fourth year thereafter submit by resolution to the legislature its determination of compensation and expense allowances, which resolution must be concurred in by at least four members of the commission.
>
> "Notwithstanding any other provision of this Constitution, such compensation and expense allowances as may be provided for by any such general law shall be paid on and after the effective date of such general law. Until the first such general law becomes

effective, the provisions of this section in effect immediately prior to the ratification of this amendment shall continue to govern."

After submission of the resolution to the Legislature, it was enacted into the Bill, which amended W. Va. Code, 4-2A-1, et seq., to increase the compensation and expense allowances of the legislators. The Bill also increased the salaries of other State officials and the judiciary. On March 19, 1994, the Honorable Gaston Caperton, Governor of the State of West Virginia, signed the Bill into law.

The issues before this Court are simply (1) whether the requirements for setting legislative compensation and expense allowances under Section 33 of Article VI of our Constitution were followed properly, and (2) whether contact by members of the Legislature with members of the Commission violated due process such that the increased compensation and expense allowances for the Legislature should be held invalid.

I.

We first address the question of the constitutionality of the Commission's resolution that resulted from its meeting on March 3, 1994. A review of the history of Section 33 of Article VI of the West Virginia Constitution is of some value to gain insight into the adoption of this 1970 amendment. Prior to the adoption

[3]The relators make no challenge in this proceeding to the pay raises granted to other State officials and to the judiciary.

of Section 33 of Article VI in its current form, which was ratified by the voters on November 3, 1970, passage of a separate constitutional amendment was required to increase the compensation and expense allowances of members of the Legislature. This constitutional requirement made it extremely difficult to get a legislative compensation constitutional amendment to increase legislative salaries passed with any frequency by the voters. This difficulty, undoubtedly, was the chief impetus behind the 1970 amendment which was designed to liberalize the ability to increase legislative compensation and expense allowances. Many states have more liberal procedures that allow the members of their legislatures

---

[4]For example, Section 33 of Article VI, contained in the 1931 Revised Code, set these salaries:

> "The members of the Legislature shall each receive for their services the sum of five hundred dollars per annum and ten cents for each mile traveled in going to and returning from the seat of government by the most direct route. The Speaker of the House of Delegates and the President of the Senate, shall each receive an additional compensation of two dollars per day for each day they shall act as presiding officers."

The editor's notes to the current provision trace the history of the various amendments to Section 33 of Article VI. These notes indicate that prior to 1970 the members of the Legislature only had two raises. The first raise came from an amendment ratified by the voters in November, 1920, which increased their salaries from four dollars a day to five hundred dollars per annum. The second amendment ratified in November, 1954, increased their salaries to fifteen hundred dollars per annum.

to increase their pay without voter approval at any time. In some states, the raise does not take effect in the session in which it was voted, while in other states, the raise does not take effect during the term of the legislators voting on it.

The relators argue that the resolution on compensation and expense allowances submitted by the Commission and reduced to the Bill complies with the mandate of Section 33 of Article VI. They point to the ten words at the beginning of the third paragraph of Section 33: "The commission shall meet as often as may be necessary[.]" They claim that this language provides that the Commission can meet as many times as desired and also can offer a resolution on compensation and expense allowances each time. Consequently, the relators contend that the Legislature can reduce the resolution to a Bill any time after the resolution is submitted.

On the other hand, the intervenors argue that the relators' interpretation of Section 33 of Article VI of the West Virginia

[5]See Ky. Const. § 42 (1979); Miss. Const. Art. 4, § 46 (1972); Mo. Const. Art. 3, § 16 (1970); N.C. Const. Art. 2, § 16 (1970).

[6]See Ga. Const. Art. 3, § 4, ¶ 6 (1983); Ill. Const. Art. 4, § 11 (1970); Me. Const. Art. 4, Pt. 3, § 7 (1983); N.Y. Const. Art. 3, § 6 (1964); Ohio Const. Art. 2, § 31 (1979).

Constitution completely ignores the remaining language of the third paragraph relating to submission of a resolution on compensation and expense allowances by the Commission to the Legislature every four years. They contend that under this language, the Commission can submit a resolution on compensation and expense allowances only once every four years based on a quadrennial cycle starting with the 1971 regular legislative session. They also state that such submission must be made within fifteen days after the beginning of the regular session, which was not done in this case.

We have not had occasion to interpret this provision. There are two Attorney General opinions that have touched on this question. The first opinion was issued on March 1, 1977, by the Honorable Chauncey H. Browning, Jr., Attorney General, to William C. Campbell, the Chairman of the Commission. Mr. Campbell had

---

[7]The third paragraph of Section 33 of Article VI states:

> "The commission shall meet as often as may be necessary and shall within fifteen days after the beginning of the regular session of the legislature in the year one thousand nine hundred seventy-one and within fifteen days after the beginning of the regular session in each fourth year thereafter submit by resolution to the legislature its determination of compensation and expense allowances, which resolution must be concurred in by at least four members of the commission."

For the entire text of Section 33 of Article VI, see note 2, supra.

inquired whether the Commission could send its resolution on compensation and expense allowances to the Legislature at intervals of less than four years. Attorney General Browning, after quoting the third paragraph of Section 33 of Article VI, concluded that a resolution must be submitted at least every four years, but one could be submitted more often. See 57 Atty. Gen. Op. 115 (March 1, 1977). Much the same reasoning was used by the Honorable Darrell V. McGraw, Jr., Attorney General, in his opinion dated March 9, 1994, addressed to the Honorable Keith Burdette, President of the Senate.

---

[8]The conclusion of Attorney General Browning's opinion states as follows:

> "The interpretation of the above constitutional section which most readily presents itself is that the Commission must submit by resolution 'to the legislature its determination of compensation and expense allowances' every four years, which is mandatory. However, it is the opinion of this office that the provision in no way restricts the Commission in presenting such a resolution more often than every four years after the year 1971. Otherwise, there would be no need for the above provision requiring the Commission to meet as often as may be necessary. What purpose would be served for the Commission to have meetings 'as often as may be necessary,' when it could take no action in accordance with the constitutional provision?" 57 Atty. Gen. Op. at 116.

We recognized in Walter v. Ritchie, 156 W. Va. 98, 109, 191 S.E.2d 275, 282 (1972), that: "Although an opinion of the attorney general is not binding upon this Court it is persuasive when it is issued rather contemporaneous with the adoption of the statute in question. See State ex rel. Battle v. Baltimore and Ohio Railroad Company, 149 W. Va. 810, 837, 838, 143 S.E.2d 331[, 347, 348] (1965)." However, in this case, we believe the Attorney General opinions failed to take into account the historical background surrounding the adoption of Section 33 of Article VI.

We also find there is an ambiguity in the third paragraph of Section 33. This ambiguity in the third paragraph arises because there is no mandatory language clearly stating that the Commission's resolution on compensation and expense allowances can be submitted only once every four years. Moreover, it is difficult to imply such a meaning as it would tend to negate the language that allows the Commission to meet as often as possible. When an ambiguity occurs, we apply the rule set out in Syllabus Point 1 of Winkler v. State School Building Authority, 189 W. Va. 748, 434 S.E.2d 420 (1993):

> "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction."

See also State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 207 S.E.2d 421 (1973).

It was this ambiguity which caused the two Attorney General opinions to hold that the Commission could submit a resolution more often than every four years. However, such an interpretation allowing the Commission to meet more frequently than every four years does not necessarily imply that it can submit a resolution at any time after it meets. This type of construction would emasculate the language in the latter portion of the third paragraph which sets out the four-year cycle beginning after the 1971 regular session of the Legislature, which would be contrary to our normal rule requiring us to consider all parts of a constitutional or statutory provision. As we set out in Syllabus Point 3 of Jeffrey v. Jeffrey, 188 W. Va. 476, 425 S.E.2d 152 (1992):

> "'"In ascertaining legislative intent, effect must be given to each part of the statute and the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975).' Syl. Pt. 3, State ex rel. Fetters v. Hott, 173 W. Va. 502, 318 S.E.2d 446 (1984)."

It is our view that this ambiguity can best be resolved by holding that what was intended was to allow the Commission to

have considerable latitude in the frequency of its meetings. However, its resolution on compensation and expense allowances must be submitted to the Legislature at sessions occurring at four-year cycles calculated from the 1971 regular session of the Legislature. Such an interpretation gives meaning to both parts of the third paragraph of Section 33. Moreover, it comports with the historical analysis of the reasoning behind Section 33 of Article VI, which was designed to loosen the extremely restrictive constitutional limitation that precluded any increase in legislative compensation and expense allowances unless it was voted on by the citizens.

From an historical standpoint, we do not believe that the Legislature in 1970, when it adopted the amendment of Section 33 of Article VI creating the Commission, which was ratified by the voters, contemplated that it would receive a resolution for compensation and expense allowances from the Commission more often than every four years. Nor do we believe that, in view of past history, the voters who approved the amendment thought otherwise.

We also conclude that Section 33 of Article VI, which allows the Commission to meet as often as necessary, is designed to give the Commission ample opportunity to examine legislation from other states and determine what would be a reasonable increase in

legislative compensation and expense allowances. Moreover, because the Commission's resolution must be submitted within fifteen days after the beginning of the legislative session, the Commission needs the opportunity to meet as often as necessary in advance of the legislative session to permit input from interested citizens.

Consequently, we hold that Section 33 of Article VI allows the Commission to meet as often as necessary. However, Section 33 restricts the Commission from submitting to the Legislature its resolution on compensation and expense allowances except on a quadrennial basis calculated from the 1971 legislative session. There is nothing in this section that requires the Legislature to act on the resolution at the legislative session when it is first submitted. Once the Commission's resolution is properly submitted, the Legislature may act on it at any time during the four-year cycle before the next resolution is required to be submitted.

Although we conclude that the Commission and the Legislature failed to follow the provisions of Section 33 of Article VI, as we now construe them, we decline to strike the increase in legislative compensation and expense allowances. As we have indicated, there has been no authoritative interpretation of Section 33 of Article VI before this case. Indeed, as we earlier observed,

the two Attorney General opinions would point to an interpretation that would justify the actions taken by the Commission and the Legislature.

In Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979), we discussed at some length the question of what effect our judicial opinion should have as to a pending case and to past events under what is termed the concept of retroactivity. In Bradley, we made this general summary in Syllabus Point 5:

> "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined

> the retroactive/prospective question in the same area of the law in their overruling decisions."

See also Syllabus Point 2, Devrnja v. West Virginia Bd. of Medicine, 185 W. Va. 594, 408 S.E.2d 346 (1991); Geibel v. Clark, 185 W. Va. 505, 510, 408 S.E.2d 84, 89 (1991); Syllabus Point 2, Ashland Oil, Inc. v. Rose, 177 W. Va. 20, 350 S.E.2d 531 (1986); Daily Gazette Co., Inc. v. Committee on Legal Ethics, 176 W. Va. 550, 551-52, 346 S.E.2d 341, 342-43 (1985); Bond v. City of Huntington, 166 W. Va. 581, 600, 276 S.E.2d 539, 549 (1981); Syllabus Point 3, Ables v. Mooney, 164 W. Va. 19, 264 S.E.2d 424 (1979).

More recently in Winkler, supra, we considered the retroactivity of an opinion in which we held that a proposed issuance of bonds to finance school improvements was unconstitutional because it violated the debt restriction provision contained in Section 4 of Article X of the West Virginia Constitution. We refused to invalidate similar bonds that were issued prior to the date of the opinion, as summarized in Syllabus Point 9 of Winkler: "Based upon our general principles of retroactivity of judicial decisions, revenue bonds issued by the State of West Virginia School Building Authority pursuant to W. Va. Code, 18-9D-1, et seq., prior to the date of this opinion are not invalid."

As we noted in Syllabus Point 5 of Bradley, supra, we generally will make an opinion prospective only where "substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent." Here, although there is no judicial precedent construing Section 33 of Article VI, there are two opinions from two different Attorney Generals indicating that the resolution on compensation and expense allowances could be filed and acted upon within the four-year cycle. Certainly, the questions in this case involve a substantial public issue as they challenge the entire procedure for obtaining increases in legislative compensation and expense allowances. These are matters in which the public, as taxpayers, have a vital interest. Consequently, we hold that based upon our general principles of retroactivity of judicial opinions, the legislative compensation and expense allowances contained in the Bill are not invalid. Thus, under Bradley, supra, we give only prospective operation to this opinion. However, in the future, both the Commission and the Legislature will be bound by the dictates of this opinion.

II.

A subsidiary attack is made on the Bill because the Commission failed to file its resolution within fifteen days from the opening of the legislative session, as required by Section 33 of Article VI. This late filing was occasioned by the fact that there were four vacancies on the seven-member Commission before the beginning of the 1994 legislative session. These vacancies were not filled by the Governor until February 7 and 11, 1994, after the Legislature was in session. These appointments were made after the fifteen-day deadline for filing the Commission's resolution.

We are not cited nor have we found a case that discusses what effect a governor's failure to appoint members of an administrative agency will have on the agency's ability to meet a statutory or constitutional deadline. However, in the past, we have attempted to solve situations that arise because of the lack of executive appointments to an administrative agency by fashioning some reasonable relief. It is apparent that an executive official could through a statutory appointment authority virtually paralyze the operation of an administrative agency by failing to exercise this power of appointment. Thus, in State ex rel. Brotherton v. Moore, 159 W. Va. 934, 230 S.E.2d 638 (1976), we held that a writ

of mandamus would lie to compel the Governor to exercise his power of appointment.

In Serian v. State By and Through West Virginia Board of Optometry, 171 W. Va. 114, 297 S.E.2d 889 (1982), we held that the Governor's failure to appoint a lay member to the Board of Optometry, as required by statute, would not deprive the Board of its jurisdiction to hear a license revocation case. More recently in Francis O. Day Co. v. West Virginia Reclamation Board of Review, 188 W. Va. 418, 424 S.E.2d 763 (1992), the Board of Review lacked the four votes required by statute from a seven-member board because of the absence of a member. The Board split three to three, and it then took no action on the administrative appeal because there were not the statutory four votes. We held that the Board must enter an order allowing an appeal to the next higher tribunal rather than delay the entire administrative decision.

---

[9]Syllabus Point 3 of State ex rel. Brotherton v. Moore, supra, states: "Mandamus lies to compel the governor to exercise his power of appointment under Section 9 of Article VI of the Constitution of West Virginia when the governor declines or fails to exercise his power for an unreasonable period of time."

[10]Syllabus Point 2 of Francis O. Day Co., supra, states:

> "When an administrative agency or board is unable to act because it lacks a statutory quorum or is unable to muster enough votes to meet a statutory requirement of a

These cases demonstrate this Court's concern that an administrative agency or commission should not be crippled by actions that are entirely beyond its control, which would destroy the reasonable expectations of the parties who are the beneficiaries of its jurisdiction. Consequently, we conclude that the late filing by the Commission of its resolution beyond the fifteen-day period set in Section 33 of Article VI of the Constitution will not defeat the resolution where it was occasioned by the lack of a quorum by reason of executive delay in making the appointments.

> minimum number of votes necessary for a decision, the agency or board must enter an order allowing the litigants in the case before it to proceed to the next higher--judicial or administrative--tribunal."

III.

Finally, we address the intervenors' due process claims which are predicated on the fact that some members of the Legislature contacted members of the Commission regarding their views as to the amount of legislative compensation and expense allowances that the Commission should recommend. This issue was not raised by the respondent Auditor Gainer. The intervenors cited no law to support this issue in their brief filed on June 3, 1994, four days before the scheduled final arguments. During the course of oral arguments, the intervenors cited two cases--Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9 (D.C. Cir. 1977), and Portland Audubon Society v. The Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993). Portland Audubon involves provisions of the Federal Administrative Procedures Act, which specifically ban ex parte communications under 5 U.S.C. § 557(d)(1) and (2) (1976). We, of course, are not controlled by the Federal Administrative Procedures Act nor does our Administrative Procedures Act, W. Va. Code, 29A-1-1, et seq., contain similar language. The issue in Home Box Office involved federal rulemaking by the Federal Communications Commission where there appears to be some restriction on ex parte communications under 5 U.S.C. § 553(c) (1966).

[11]In making this observation, it should not be inferred that we find the Commission to be under our Administrative Procedures

Whatever due process force Home Box Office, supra, may be said to have outside the restrictions contained in the Federal Administrative Procedures Act was not recognized by the same court in its later opinion in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). In Sierra Club, the court, after footnoting a variety of commentators' views regarding ex parte communications involving informal rulemaking of a policymaking sort, came to this conclusion:

> "Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all

---

Act.

[12]In Sierra Club, 657 F.2d at 402, this statement is made:

> "Lacking a statutory basis for its position, [Environmental Defense Fund] would have us extend our decision in Home Box Office, Inc. v. FCC to cover all meetings with individuals outside EPA during the post-comment period. Later decisions of this court, however, have declined to apply Home Box Office to informal rulemaking of the general policymaking sort involved here[.]" (Footnotes omitted).

> face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs." 657 F.2d at 400-01. (Footnotes omitted).

In this case, we view the Commission, at best, as a limited administrative agency empowered to act on the very narrow issue of legislative compensation and expense allowances. Its resolution may be considered as policymaking of a sort, but we agree with the foregoing statement from Sierra Club and its conclusion that it would not impose a judicial prohibition fashioned under a due process rubric on ex parte communications to informal administrative proceedings. Based on the above, we find no merit in the intervenors' due process argument.

IV.

In conclusion and for the reasons stated in this opinion, we issue a writ of mandamus directing Auditor Gainer to process the legislative compensation and expense allowances in accordance with the terms contained in the Bill. Moreover, we issue a writ of

prohibition against Judge Canady directing that he proceed no further with the declaratory judgment action involving the issues resolved by this opinion.

Writs granted.