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May 25, 2011

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force

RE: STAFF REPORT: ADMINISTRATIVE RULEMAKING

INTRODUCTION

In recent interims, the Legislative Education Study Committee (LESC) has taken an interest in the number and content of the rules promulgated by the Public Education Department (PED) and Higher Education Department (HED), in some cases to implement requirements of enacted legislation.

In order to clarify the Legislature's relationship with the Executive, this staff brief reviews the provisions in law that govern the rulemaking process.

RULEMAKING REQUIREMENTS

In general, rules are written by the various state agencies to implement, clarify, and support the more general laws enacted by the legislature. While each agency may have its own internal procedures, in order to properly promulgate these rules, all agencies must go through a regulatory process that includes certain requirements and procedures prescribed in:

- the *Administrative Procedures Act* (Chapter 12, Article 8 NMSA 1978);
- the *State Rules Act* (Chapter 14, Article 4 NMSA 1978);
- the *New Mexico Administrative Code* (Code) (Title 1, Chapter 24); and
- Chapter 14, Article 11 NMSA 1978, regarding records, rules, notices and oaths.

ADMINISTRATIVE PROCEDURES ACT

In general, the *Administrative Procedures Act* (APA) provides the most comprehensive procedural requirements for an agency to undertake a rulemaking, whether on its own initiative, or when an agency receives a petition to begin a rulemaking.¹ Among its provisions, the APA outlines procedures for:

- publication of notice and public comment;
- agency review of public input and other materials;
- emergency rules; and
- administrative and judicial review.

Publication of Notice and Public Comment²

The APA requires an agency that undertakes a rulemaking to:

- **at least 30 days prior to any proposed action, notify any person specified by law and any person who files a written request to be notified of any proposed action which may affect them. This notice must include:**
 - **the time and place of any public hearing, or the manner in which material regarding the rule can be submitted to the agency;**
 - **a description of the substance and issues involved in the rulemaking, or the express terms of the rulemaking;**
 - **any additional material required by law; and**
 - **the statutory authority for the proposed rule;**
- publish a notice of rulemaking or a proposed rule, both in the *Register* and in a newspaper of general circulation, at least 30 days prior to any proposed action;³ and
- give all interested persons reasonable opportunity to submit data or arguments, either orally or in writing, and examine witnesses regarding the proposed rule.

Agency Review of Public Input and Other Materials

Among its provisions, the APA directs agencies to:

- consider all written and oral submissions regarding the proposed rule, and may revise the rule according to public input; and
- if a rule is contested, the agency must issue a concise statement, which must include:

¹ Any person may petition an agency to promulgate, amend or repeal a rule, and may include with that petition pertinent information and arguments. Within 30 days of the submission of a petition, an agency must either initiate the rulemaking process, or deny the petition in writing, and state reasons for the denial.

² The *Public School Code* additionally requires PED to “solicit input from local school boards and school districts in the formulation and implementation of department rules.”

³ According to Chapter 14, Article 11 NMSA 1978, regarding notices, records, rules and oaths, all notices must also be published on the agency’s website, although this electronic posting is not a substitute for the required publication, and failure to post this information to the website is not grounds to challenge a rule’s validity.

- the reasons for adopting the rule;
- a statement of rejected positions; and
- the reasons why those positions have been rejected.

Emergency Rules

In order to forgo the ordinary process and promulgate a rule as an “emergency,” the APA requires an agency to:

- find for good cause that:
 - an immediate rulemaking is necessary for the preservation of public peace, health, safety, or general welfare; or
 - observance of ordinary requirements of notice and public hearing would be contrary to the public interest;
- include this finding, and the reasoning behind it, in the emergency rule; and
- upon adoption of an emergency rule that will remain in effect for more than 60 days, within seven days, publish notice in the same manner as is required for ordinary rulemakings.

Administrative and Judicial Review

According to the APA:

- failure to comply with statutory requirements, such as publication of notice, may result in invalidation of the rulemaking; and
- anyone whose interests may be impaired or damaged by a rulemaking may:
 - petition the agency for a declaratory ruling as to the applicability of the rule (subject to judicial review), unless the agency has good cause to consider the issuance of such a ruling undesirable; and
 - bring an action in the district court of Santa Fe County for declaratory judgment to determine the applicability or validity of a rule.

STATE RULES ACT

Additional provisions regarding rulemaking are found in the *State Rules Act*, particularly those provisions directly pertinent to the authority and duties of the State Records Administrator and Administrative Law Division, and to technical rulemaking requirements.

Authority and duties of the State Records Administrator and Administrative Law Division include:⁴

⁴ The Administrative Law Division and State Records Center are not authorized to investigate the validity of rules.

- the publication and maintenance of the *Code*,
- the promulgation of rules of procedure prescribing the format, structure and compilation of the *Code*; and
- the supplementation or revision of the *Code* at least once annually.

Technical rulemaking requirements and procedures state that:

- the *Register* is published twice monthly, and an agency must adhere to the technical, formatting and clerical submittal requirements for publication by the State Records Administrator;
- the Administrative Law Division will ensure that the rule complies with all technical requirements, and date- and time-stamp the rule for inclusion in the *Code* and publication in the *Register*;
- no rule is valid or enforceable until filed and published; and
- emergency rules may be effective immediately upon filing with the Division, but will be effective for only 30 days unless published in the *Register*.

NEW MEXICO ADMINISTRATIVE CODE (TITLE 1, CHAPTER 24)

Title 1, Chapter 24 of the *Code* contains rules promulgated by the New Mexico Commission of Public Records outlining technical requirements and procedures that must be followed in order for a rule to be accepted for publication in the *Register* and the *Code*. These rules include provisions stating that:

- an agency must file rules with the Administrative Law Division, and include a transmittal form signed by the appropriate agency authority, such as the secretary of an agency;
- if a rulemaking does not conform to the clerical, technical, and formatting requirements necessary to publication, it may be rejected; and
- upon filing, emergency rules are “converted” to regular rules.

ISSUES FOR CONSIDERATION

There appears to be some conflict among these various bodies of law regarding the effective date of filed and published rules.

The APA, which was promulgated before the most recent amendment of the section of the *State Rules Act* regarding effective dates, includes:

- a provision setting the effective date of rules at 15 days after submission, unless a later effective date is provided by rule and other law;
- a provision stating that the purpose of the APA is to promote uniformity with respect to administrative procedures and that, as such, it should be interpreted liberally; and
- a conflict clause, which asserts that the APA will control in any apparent conflict with another law, unless that law specifically creates an exception.

The *State Rules Act* does not iterate a specific exception to the corresponding section of the APA, but was amended much more recently than the APA to specifically indicate that a rule becomes effective upon publication by the *Register*.

The *Code* clarifies that:

- in no event can a rule be effective *before* the date of publication in the *Register*; and
- if a rule is not filed by the submission deadline of a particular publication date,⁵ the rule will be published in the next edition of the *Register*, and the effective date will be adjusted accordingly, if necessary.

In actual practice, the provision for effective dates in the *State Rules Act*, the publication date, appears to be the section that controls.

⁵ Submission deadlines for each publication date are listed online, at:
<http://www.nmcpr.state.nm.us/nmregister/schedule.htm>