

**MINUTES  
of the  
SECOND MEETING  
of the  
REGULATORY PROCESS SUBCOMMITTEE**

**October 27, 2010  
Room 307, State Capitol  
Santa Fe**

The second meeting of the Regulatory Process Subcommittee (RPS) was called to order by Representative Edward C. Sandoval, co-chair, at 10:05 a.m. on Wednesday, October 27, 2010, in Room 307 of the State Capitol.

Revenue Stabilization and Tax Policy Committee Members

**Present**

Sen. Steven P. Neville  
Rep. Edward C. Sandoval, Co-Chair  
Rep. Jim R. Trujillo

**Absent**

Sen. Tim Eichenberg  
Sen. Howie C. Morales  
Rep. Don L. Tripp

Economic and Rural Development Committee (ERDC) Members

**Present**

Rep. Patricia A. Lundstrom  
Rep. Debbie A. Rodella  
Sen. Bernadette M. Sanchez, Co-Chair

**Absent**

Rep. William J. Gray  
Sen. George K. Munoz  
Sen. William E. Sharer

Courts, Corrections and Justice Committee Members

**Present**

Rep. Zachary J. Cook  
Sen. Linda M. Lopez  
Sen. John C. Ryan  
Rep. Mimi Stewart  
Sen. David Ulibarri

**Absent**

Rep. Al Park

**Guest Legislators**

Rep. Mary Helen Garcia  
Sen. Timothy M. Keller

**Staff**

Peter Kovnat  
Sandy Mitchell  
Jennifer Rabinowitz

**Wednesday, October 27**

**Administrative Procedures Act (APA) Task Force Final Report and Recommendations**

Kelly O'Donnell, superintendent, Regulation and Licensing Department (RLD), provided the subcommittee with a report from the lieutenant governor's task force on the model APA. The purpose of the task force is to review the proposed model APA, state agency rulemaking processes and rulemaking processes in other states and to make recommendations concerning the adoption of part or all of the model APA. Superintendent O'Donnell informed the subcommittee that the task force focused on two components of the model APA: rulemaking and the creation of an office of administrative hearings. She said that the task force's objective is to increase public participation earlier in the rulemaking process and to make the rulemaking process more uniform across state agencies.

Superintendent O'Donnell provided the subcommittee with proposed amendments to the State Rules Act, which are based on modifications of the model APA. Superintendent O'Donnell explained the proposed amendments to the subcommittee. She said that the objective of the new definitions is to broaden and clarify public notice requirements. The new filing provisions are intended to clarify the intent of new rules and to modernize the filing process. Filings will have to include a concise explanatory statement so that the public can understand the thinking behind a proposed rule. The new provisions will also require that an annual regulatory agenda be published by an agency undertaking the rulemaking process. The agenda must include a list of pending rulemakings, the current status of all ongoing rulemakings and any rulemakings expected for the upcoming fiscal year. Agencies will be required to provide a detailed outline of proposed rulemaking to the public. The outline must include the subject matter of the proposed rule, the statutory authority for rulemaking, the purpose of the rulemaking, the agency adopting the rule, the procedure and deadlines for providing public input on the drafting of the proposed rule, the expected time line for adoption and the agency contact information. In some instances, the creation of a rule-drafting committee may be appropriate for more complicated or potentially contentious rules. If a rule-drafting committee is convened, the meetings would be open to the public. Agencies will be required to maintain a record of the rulemaking process that is available to the public. At the time an agency adopts a rule, it must provide to the public a concise explanatory statement that includes the agency's reasons for adopting the proposed rules as well as the reasons for not accepting substantive arguments made in opposition to the rule.

Tracy Hughes, general counsel, Department of Environment (NMED), discussed the creation of an office of administrative hearings, which was discussed and agreed to by the task force. She presented legislation that would create a pilot program for three agencies (Taxation and Revenue Department, Energy, Minerals and Natural Resources Department and NMED). Other agencies would be able to opt in with an appropriate budget transfer. She said that the language was based on the model APA. It would cover all permitting or adjudicatory proceedings conducted by agencies subject to the act. The office of administrative hearings would be composed of a chief administrative law judge appointed by the governor for a term of six years and other judges transferred from the agencies subject to the act. The budget for the judges is transferred from the existing agencies to the newly created office.

Ms. Hughes was asked whether this bill would create any new exempt positions. She said that only the chief administrative law judge would be an exempt employee. The other

hearing officers would be transferred from existing agencies and housed in the new office.

Superintendent O'Donnell was asked why the task force did not provide any recommendations on providing a budget impact or economic impact of proposed rules. Superintendent O'Donnell said that it would be difficult to mandate a quality analysis because agencies do not have the money to provide it right now. Several subcommittee members stressed the importance of adding a budget impact and economic impact analysis to any proposed legislation.

Superintendent O'Donnell was asked to discuss the rules review component of the model APA. Superintendent O'Donnell explained that this component concerns legislative review of rules. She said that the issue was too large and too difficult for the task force to reach a consensus.

A member of the subcommittee suggested that the proposed legislation on creation of the new office of administrative hearings be submitted to the Government Restructuring Task Force for consideration by that body.

Ms. Hughes was asked to explain how the process at the office of administrative hearings would be different from the current process. She said that the law judges would no longer be supervised by the agency proposing the action. Their authority would stay the same, but they would have complete independence. The state agency would still have ultimate decision-making power. A subcommittee member expressed concern that the expertise of hearing officers may be compromised if they are no longer housed at the agencies because they would no longer be interacting with people knowledgeable in the subject area.

Ms. Hughes was asked about the cost of the new office. She said that the task force is trying to set up the office in a way so that there would be little or no cost. She said that the only cost would be for housing the new office. Concern was expressed by a subcommittee member over having the governor appoint the chief administrative law judge. Superintendent O'Donnell was asked how much the RLD spends for contract hearing officers. She said that the usual charge is \$85.00 an hour and that the department spends somewhere between \$8,000 and \$10,000 annually on contract hearing officers.

Superintendent O'Donnell was asked if the proposal deals with executive orders. She said that executive orders are not germane to what the task force is doing, because an executive order alone is not sufficient authority to adopt a rule. An agency needs statutory authority to adopt rules. Superintendent O'Donnell was asked whether there is any way to prevent agencies from going beyond their authority. Superintendent O'Donnell suggested that the new requirements proposed by the task force will help in this regard, because the requirements will force agencies to clarify what they are doing and because stakeholders will be able to point out if an agency is overstepping its bounds and the agencies will be forced to respond.

Senator Ryan made a motion to endorse the proposed legislation on rulemaking, subject

to it being drafted by the Legislative Council Service (LCS). Representative Sandoval reminded the subcommittee members that they cannot endorse a bill in concept. He requested that the task force's report be included in the final report of the subcommittee to the Revenue Stabilization and Tax Policy Committee, the ERDC and the Courts, Corrections and Justice Committee with a recommendation that the bills be considered for endorsement. Representative Lundstrom requested that the legislation concerning the creation of an office of administrative hearings be sent to Jonelle Maison at the LCS for distribution to the Government Restructuring Task Force.

### **Approval of Minutes**

The minutes of the first meeting of the subcommittee were approved with amendments specifying motions made by Representative Rodella and Senator Lopez at the first meeting.

### **Small Business Regulatory Advisory Commission: Status Report**

Alan Oliver, deputy secretary, Economic Development Department, and T.J. Trujillo, chair, Small Business Regulatory Advisory Commission, provided a status report on the commission. Mr. Oliver explained that the commission is made up of nine members. One position is still yet to be filled. The commission will meet on November 5, 2010 to address several issues, including greenhouse gas reporting. Mr. Trujillo explained that the intent of the commission is to look at the economic impact of rules on small businesses. He stated that large businesses can afford to do their own impact studies, but small businesses cannot.

Mr. Trujillo was asked whether the commission had made any findings on economic impact yet. Mr. Trujillo explained that the commission has not been active for 2.5 years and that he only came on board two or three weeks ago. He said that it is his personal opinion that small businesses need an entity that looks at economic impact.

Superintendent O'Donnell was asked why the RLD was not included in the pilot program for an office of administrative hearings. She said that the department has seven divisions, and each division does a lot of rulemaking. She said that the department is not conducive to a pilot program because of its broad array of licensing entities and its broad array of licensing processes. She also said that the department does not have hearing officers on staff. The attorneys do other work for the department in addition to hearings, so the department cannot donate the attorneys to a separate office.

Mr. Oliver and Mr. Trujillo were asked whether the commission will interact with the financial community to discuss the problem of the financial community not lending out money. Mr. Oliver said no, the commission focuses on executive agencies. Mr. Trujillo explained that to the extent agency rules impact a small business's ability to get a loan, the commission could look at those rules.

Mr. Trujillo was asked about the difficulties facing small businesses in attending rulemaking hearings and hiring attorneys. Mr. Trujillo explained that small businesses do not have the time or resources to deal with the rulemaking process. Getting involved in the process is also made more difficult by the fact that the rulemaking process differs among agencies. Mr.

Trujillo stated that a more uniform process is needed to make it easier to navigate. He said that the commission will help by letting agencies know about the impact on small businesses.

### **Options for Legislative Oversight of Executive Rules: Proposed Legislation**

Mr. Kovnat, staff attorney, LCS, discussed options for legislative oversight of executive rules. Mr. Kovnat explained that a legislative veto raises a separation of powers issue. Most state courts that have looked at this issue have concluded that in order to overturn a rule, the legislature must pass a bill and have it signed by the governor. Idaho is the only state that has ruled otherwise. In Idaho, the court found that rules are not equal in status to laws and therefore may be revoked in another way. Mr. Kovnat discussed how New Jersey amended its constitution to allow for a legislative veto. Legislative vetoes by the U.S. Congress have been found by the U.S. Supreme Court to violate the U.S. Constitution.

Mr. Kovnat discussed some of the pros and cons of legislative vetoes and discussed some of the other means of achieving legislative oversight, including report-and-wait provisions, sunset provisions, apportionment processes, oversight hearings and narrowly defined rulemaking authority in enabling statutes. He provided the subcommittee with copies of bills introduced in the New Mexico Legislature that contain examples of these various options.

HJR 4 from 2010 was presented as an example of a legislative veto. It allows the legislature to nullify an adopted rule by passage of a resolution by a majority of the legislature. Mr. Kovnat was asked about the history of this legislation. He responded that it died in committee. Mr. Trujillo explained that similar legislation had been introduced three years ago and had passed the senate but died in the house. Mr. Kovnat was asked about the ability of the governor to suspend the enforcement of a rule by executive order. He said that he would look into it. Mr. Kovnat was asked about the adoption of rules that create policy rather than just provide procedures. He explained that current statutory language gives agencies the ability to promulgate reasonable and procedural rules; some agencies interpret this to mean that a rule must be either reasonable or procedural. It was noted by a subcommittee member that historically agencies were only promulgating procedural rules, but that the current administration has ventured into policymaking. Subcommittee members expressed their support of legislation that would limit agencies to only promulgating procedural rules.

SJR 7 and HJR 12 from 2008 were presented as examples of a report-and-wait provision. This provision allows the legislature to enact laws that prohibit rules from taking effect until reviewed and approved by a legislative committee. It also allows legislative committees to annul an adopted rule if the committee finds that the executive branch was not authorized to adopt a rule. HB 575 from 2009 was presented as an example of a cost-benefit-analysis provision.

The subcommittee discussed whether to endorse HJR 4 from 2010 or SJR 7 from 2008, both of which contain override provisions. Subcommittee members expressed their support for HJR 4 with some possible rewording to deal with any constitutional issues. Subcommittee members discussed whether the sponsor of the joint resolution in 2010, Representative Andy Nuñez, might be intending to make any changes to the legislation or if he is intending to

introduce the same legislation next session. Mr. Trujillo informed the subcommittee that he had spoken with Representative Nuñez on this issue, and Representative Nuñez intends on refiling the same legislation. Representative Lundstrom moved that the subcommittee recommend that HJR 4 from 2010 (.180118.3) be brought back to the ERDC for endorsement. Representative Sandoval seconded the motion. Representative Rodella asked if staff could meet with Representative Nuñez before the next ERDC meeting to see if he wants any changes to the legislation and then poll the subcommittee as to its approval and then add the subcommittee's endorsement on the bill. Senator Sanchez suggested adjusting the motion to reflect the subcommittee's endorsement of the veto override concept.

Concern was expressed about the use of report-and-wait provisions. Sometimes rules need to be adopted quickly (e.g., to respond to federal legislation), but the New Mexico Legislature only meets once a year. It was suggested that the legislature may be overstretching itself if it has to look at every rule. If interim committees are given the power to review rules, a lot of time will need to be dedicated to that task.

Mr. Kovnat was asked about doing a veto provision by bill rather than joint resolution. Mr. Kovnat said that such a bill would raise constitutional issues. Of the 11 states that have tried such a procedure, only Idaho found it constitutional. Subcommittee members discussed the possibility of delaying the effectiveness of regulations for one year after passage of a bill authorizing the rules. Concern was raised that such a solution would not help with existing statutes and the broad authority that some agencies already have.

Representative Lundstrom withdrew her motion on HJR 4. Senator Sanchez instructed staff to include in the subcommittee's report that HJR 4 was discussed at length.

Mr. Kovnat presented a bill draft (.183166.1) requiring an agency to get verification from the Department of Finance and Administration and the Attorney General's Office that the agency is acting within its statutory authority when proposing a rule.

Mr. Kovnat was asked about legislation to clarify that agencies have no authority to implement policy by rules. He presented a draft (.183042.1) that amends the statute authorizing "reasonable and procedural rules" to have it authorize "rules to carry out the duties of the department and its divisions". The new wording would take away the argument that a rule only needs to be reasonable. Senator Sanchez said that the language should specify that agencies can only adopt procedural rules and "procedural rules" should be defined in the bill. Senator Neville said that the word "specific" should be added to each of the language changes in the bill. Mr. Kovnat read aloud language from a Florida statute that he thought would cover the concerns of the members. The subcommittee had no objection to amending the language to include the language from the Florida statute.

Mr. Kovnat presented HB 575 from 2009 to the subcommittee as an example of a regulatory flexibility analysis and impact statement provision. The bill amends the State Rules Act to require regulatory impact statements under certain circumstances.

Mr. Kovnat discussed how sunset provisions avoid constitutional issues by including the nullifying authority in the enabling statute. He noted that such provisions can be costly because promulgating rules is a costly process. Mr. Kovnat provided the subcommittee with a bill draft (.183016.1) with a sunset provision. The bill draft also grants the Small Business Regulatory Advisory Commission the authority to nullify a rule that has an adverse effect on small businesses. Concern was expressed by subcommittee members about giving one group too broad an authority to nullify rules.

Mr. Kovnat presented HB 614 from 2008 as an example of a deferment provision. By requiring legislative review by both standing and interim committees, the legislation has the effect of a deferment, because both processes cannot happen at the same time.

Mr. Kovnat presented to the subcommittee a bill draft (.183058.2) as an example of a sunshine provision. The bill draft requires the entire text of a proposed rule to be published on the agency web site. Mr. Kovnat explained that the words "statement of policy" should not have been stricken in the bill draft. It was suggested that a definition of "statement of policy" be added to the bill.

Mr. Kovnat presented to the subcommittee a bill draft (.183022.1) that requires an economic impact statement for state agency rules and that holds agencies responsible for underestimating the economic impact of rules. The issue of where the money would go is not resolved in that bill. He explained that the money cannot go to private entities because of the antidonation clause.

Mr. Kovnat presented SB 18 from 2009 to the subcommittee as another option. It provides for negotiated rulemaking committees. The language is all permissive, not mandatory. It is not an example of legislative oversight.

Mr. Kovnat presented SB 732 from 2009 to the subcommittee. It requires state agencies to promulgate rules on time frames for responses to license applications. He explained that this bill is more about licenses than rules. Senator Ulibarri said that he would like to endorse this bill and would be happy to carry it. He said that the reason he tabled this bill in committee was because a lot of agencies came to him and said that they did not have the resources.

Senator Sanchez recommended that all the bills presented to the subcommittee go before the ERDC for endorsement. She informed the subcommittee that a report will be created with all the bills and the discussions and issues that came up in the subcommittee. The APA task force recommendations will also be included in a the report. Representative Lundstrom requested that information be provided in a chart form, showing the key issues and status.

The co-chairs thanked the members for their participation.

The subcommittee adjourned at 3:35 p.m.

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