

Alaska State Legislature
SENATE STATE AFFAIRS STANDING COMMITTEE

February 3, 2005

3:33 p.m.

MEMBERS PRESENT

Senator Gene Therriault, Chair
Senator Thomas Wagoner, Vice Chair
Senator Charlie Huggins
Senator Bettye Davis
Senator Kim Elton

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

Overview: Department of Administration - Hearings and Appeals
Legislative Legal Services Review Process of Department Proposed
Regulations

PREVIOUS COMMITTEE ACTION

No previous action to report.

WITNESS REGISTER

Deborah Behr
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Outlined steps in the regulation adoption
process

Terri Lauterbach
Legislative Legal and Research Services Division
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT:

Terry Thurbon
Acting Chief Administrative Law Judge

Department of Administration
PO Box 110200
Juneau, AK 99811-0200

POSITION STATEMENT: Presented the Report from the Office of Administrative Hearings

ACTION NARRATIVE

CHAIR GENE THERRIAULT called the Senate State Affairs Standing Committee meeting to order at [3:33:28 PM](#). Present were Senators Davis, Wagoner, Elton and Chair Therriault. Senator Huggins arrived momentarily.

^ Overview: Department of Administration - Hearings and Appeals

CHAIR THERRIAULT announced the committee would hear an overview of the changes made to the State of Alaska regulatory process as a result of three pieces of legislation that were passed during the previous session. The State Affairs Committee was hearing the review because it oversees the Department of Administration and that is where much of the administration of regulation takes place.

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DEBRA BEHR, Assistant Attorney General with the Department of Law, advised that she has been regulations attorney for the State of Alaska since 1991 and that she would outline how regulations are developed in the state and how the regulations interface with the regulatory review process.

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She pointed to exhibits 1-6 and explained that they outline the steps in the regulation adoption process.

HB 424 passed in 2004 formalized the legislative review process of administrative regulation.

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The Administration is taking the review process seriously and it has been successful. She has trained over 100 administrative agency personnel on the process and over 40 assistant attorneys general. She also updated the manual on the process and it's available online.

Feedback is that regulations in the State of Alaska have improved with the new process.

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She explained that the State of Alaska established a broad definition for "regulation" and set a standard for application. If a standard is set against the public, it must go through the Administrative Procedures Act - it is a regulation and the public must have notice and an opportunity to comment. For this to happen, there must be a statute to adopt regulations.

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EXHIBIT 1:

Sec. 44.62.640. Definitions for AS 44.62.010 - 44.62.630.

(a) In AS 44.62.010 - 44.62.320, unless the context otherwise requires,

(3) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

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EXHIBIT 2:

Flow Chart showing the steps in the Regulation Adoption Process:

1. Planning and decision-making
2. Agency develops draft regulations, public notice, and fiscal note

3. Consultation with agency attorney
4. Department of law opens file;
(a) Legislative Legal Concurrent Review Process [Exhibit 6]
5. Agency publishes and distributes public notice, additional notice information, and regulations
6. Public comment period; oral hearing - if any
7. Agency adopts regulations
8. Final regulations package submitted to Department of Law for review and approval; Governor's Office conducts review
9. Agency attorney reviews regulations
10. Regulations attorney reviews and either approves or disapproves regulations
11. Unless returned by the Governor, Lt. Governor's Office files approved regulations; effective in 30 days
 - (a) Lt. Governor's Office sends regulations to Administrative Review Committee;
 - (b) Regulations published in Alaska Administrative Code (AAC)
12. Agency posts summary on Alaska Online Public Notice System

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EXHIBIT 3: Lists the AAC agency contact names and numbers as of 1/13/05

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SENATOR KIM ELTON questioned whether you go back to the step 6 public comment period, if the regulations change substantively in steps 10 or 11.

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MS. BEHR replied that could happen. If public comment says the regulation isn't fair or complete then it should go back through the public comment period. If change occurs as a result of public comment, it wouldn't have to go back through the public comment process. She advises commissioners to go for more public comment anytime there's doubt because it's never wrong to ask for more public comment.

SENATOR ELTON noted the timeframe listed in box 11 and asked whether there were any parameters earlier in the process.

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MS. BEHR replied some are applied by statute. For example, there must be at least 30 days between step 5 when a commissioner gives public notice and step 7 when the regulation is adopted.

The public has a right to believe a decision will be made in a reasonable time period and more than a year is not reasonable. That isn't in statute but it's a due process issue.

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CHAIR THERRIault clarified that she said no sooner than 30 days but no later than a year and acknowledged that pressure is applied from several directions. There's pressure to get a program into place and at the same time there's pressure to wait until the regulations are in place.

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MS. BEHR agreed but emphasized that if the regulations aren't in place, you'll lose in a court challenge in this state.

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SENATOR THOMAS WAGONER remarked the Certificate of Need is a good example.

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MS. BEHR returned to Exhibit 3 and advised that many departments have helpful web sites.

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EXHIBIT 4:

Lists Internet addresses regarding regulations matters.

http://www.law.state.ak.us/doclibrary/drafting_manual.html
regulations manual

<http://www.legis.state.ak.us/cgi-bin/folioisa.dll/aac> current regulations

<http://notes3.state.ak.us/pn/pubnotic.nsf> online public notice system

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EXHIBIT 5:

Contains a copy of CSHB 424(JUD)(efd fld S)

EXHIBIT 6:

FLOW CHART FOR NEW LEGISLATIVE REVIEW PROCESS FOR APA REGULATIONS (Ch. 164, SLA 2004) [This is step 4 (a) in Exhibit 2 above]

CHAIR THERRIAULT said he was pleased to hear her say that having early legislative oversight is helpful.

MS. BEHR replied it's productive.

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CHAIR THERRIAULT pointed to Exhibit 2 and showed the new step between 4 and 5 that allows the legislative attorney a look at the regulations early in the process.

He explained that the Exhibit 6 flow chart details the new step between 4 and 5 in the Regulation Adoption Process.

He asked Ms. Lauterbach to explain how it works.

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TERRI LAUTERBACH, Legislative Legal and Research Services attorney (LAA), reported that her work has been productive and that the relationship between her division and the agencies has been good. She warned of a gap in the process because no one is charged with follow up to see whether or not an agency made the changes that she suggested and the agency agreed to make.

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MS. LAUTERBACH said since everyone had a copy of her memo regarding the review process, she would respond to questions.

CHAIR THERRIAULT told her the memo wasn't part of the packet and asked her to give a verbal review. He noted that the members did have a copy of the statute.

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MS. LAUTERBACH referenced Exhibit 2, which shows the steps in the Regulation Adoption Process, and explained that legislative legal is contemporaneous with step 5 and step 6 - during the public comment period - rather than between step 4 and step 5 as stated previously.

She said E-mails are sent to the affected standing committees at the same time that LAA receives notification. At that time, LAA decides whether they will conduct a review of regulations. The law says her office must review proposed regulations that implement new or change state statutes. That kind of regulation triggers an automatic review.

She wouldn't automatically review a regulation that updates references or establishes a new direction within a statutory authority unless all other reviews were completed. However, this type of review would become priority if a standing committee or Legislative Council directed her to conduct a review because the proposed regulations implicate major policy developments.

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She noted a limitation in AS 24.20.105 (g), which states that LAA may not release information regarding a review except as described in the section. LAA may send written copies of the determination to the Administrative Regulation Review Committee, the presiding officers, DOL, and state agencies. It doesn't say that LAA can send a copy of the determination to the standing committee that may have requested the review.

Reports aren't sent out unless she finds a problem and there is no way for the standing committee that requests a review on a set of regulations to learn of the determination. She suggested that should be fixed.

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CHAIR THERRIAULT explained that they were making an effort to control the number of reports that are distributed.

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MS. LAUTERBACH reiterated that the statute is very clear about who may receive a copy of the review and the requester isn't specified.

CHAIR THERRIAULT asked if they could ask her whether she just completed a review.

MS. LAUTERBACH acknowledged they could but it probably wouldn't be a fruitful question.

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SENATOR ELTON asked whether all members of the Regulation Review Committee receive notification or just the chair.

MS. LAUTERBACH said they only notify the chair.

SENATOR ELTON expressed concern that no legislator in the minority party would be notified if a major state policy shift occurred.

3:55:18 PM

CHAIR THERRIAULT acknowledged they could review the suggestions in the memo and consider legislation. He then asked about the number of reviews and when she began work.

MS. LAUTERBACH replied the effective date was 10/26/04 and since then she has received 18 sets to review and has reviewed all but two. Eight of the 18 were based on new or changed state statutes so she reviewed all eight. Seven of the eight were for SLA 2004 and one implemented a statute passed in 2002. She issued four reports.

The standards used relate to statutory authority, constitutionality, and statutory consistency. Typically the problems related to drafting errors such as reference to repealed statutes, inconsistent or inaccurate internal references of the regulations. Sometimes, she said, the regulation isn't clear enough for enforcement.

MS. LAUTERBACH said that two of her reports addressed whether or not the agency was interpreting the authorizing statute correctly. One related to a gap in regulations where part of a law wasn't implemented. Except for the question about whether the regulation interpreted the statute properly, the state agencies agreed to make the suggested corrections or to reconsider the clarity of the language used.

MS. LAUTERBACH said that although the agencies have agreed to reconsider and make the changes she suggested, no one has the duty to make sure that happens.

A committee hasn't designated a set of regulations as comprising a major policy development so she hasn't done that type of review yet, she said.

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She received 10 non-priority regulations to review and has completed eight. Four made minor changes to occupational licensing regulations, two updated reference to outside sources and two made minor language changes. She said she didn't issue any reports because none had significant deficiencies.

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CHAIR THERRIAULT recapped that one issue is that agencies may indicate that they will make suggested changes, but the Legislature doesn't have the power to force the regulation changes because that's an administrative function. The Legislature does have the power to make statutory changes and all indications are that the arrangement is good.

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SENATOR ELTON noted that Ms. Lauterbach enters the process after step four and he was curious whether she might sit in on public hearings or simply conduct a paper review matching language to statute.

MS. LAUTERBACH advised it's a legal review that is more similar to a quality control review than a commentary on clarity. She focuses on comparing the statute to regulations.

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CHAIR THERRIAULT asked Terry Thurbon to come forward.

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He explained that a second piece of legislation that passed related to bringing in an independent regulation arbiter rather than having the regulation writer sit as a judge if the regulation is challenged. "We've collected all the hearing officers from the departments and pulled them together under Terry so there is an arms length between the judge and the people who wrote the laws," he said. He asked her to explain her part in the new system.

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TERRY THURBON, Acting Chief Administrative Law Judge for the Office of Administrative Hearings, said the office has been

operating as an organizational unit since January 1, 2005 to provide adjudications and assist in hearings.

She said SB 203 has four operative provisions and three are in effect currently. The office and the administrative law judge position were created by provision and provision also allowed regulations work to be started during the interim and before the July 2005 effective date. A transition provision allowed the Department of Commerce, Community and Economic Development (DCCED), the Department of Revenue (DOR), and the Department of Administration (DOA) to agree to the transfer of hearing officers and functions.

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To expedite the matter they arranged for the employees and their functions to be transferred as of January 1, 2005. Initially 321 open cases were transferred and in the first 30 days the office received an additional 100 referrals. "If that's the sign of things to come, we're not going to want for work," she said.

She referred to a handout that showed the main case categories. Between 70 and 75 percent of the caseload is from the Department of Revenue and is represented by Child Support Services cases and Permanent Fund cases. Occupational licensing represents between 35 and 40 categories most of which are related to board and commission decisions.

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Going forward, they believe that in addition to providing the basic hearing function, they must consider the lead up to hearings and resolving some matters on motion practice - short of having an evidentiary proceeding.

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They hope to develop the regulations for hearing procedures by 7/1/05 because two major regulations projects lie ahead. These are the procedural regulations for the conduct of the hearings and a code of conduct for all hearing officers in the state system.

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Another part of the regulations duty is a review of other agency regulations that pertain to the process of hearings and that duty will continue into the future.

In addition to the hearing function, regulation development and review function, Ms. Thurbon identified four more core functions:

- Peer reviews internal to the office - rather than of other administrative law judges, hearings, and decisions - to achieve consistency in decision making, clarity in decision writing, and as a training opportunity for people who working in new areas
- Mandate to publish all administrative decisions - includes decisions made inside and outside the Office of Administrative Hearings
- Surveying hearing participants to monitor the effectiveness of the hearing process
- Training function - make training available to a broad range of people involved in the administrative adjudication process

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MS. THURBON said she would answer any questions.

CHAIR THERRIAULT recapped and said he anticipates the changes will result in more consistency and a better product. He hopes that hearing officers realize that when regulations are poorly drafted, dispute resolution goes against the agency. The changes also address the disparity between agencies in how to conduct hearings, the level of training and the level of pay.

CHAIR THERRIAULT asked Ms. Thurbon whether she knew of anyone who directly petitioned the court to be removed from the regulatory process so they could argue the case directly in court.

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MS. THURBON said she hadn't heard of anyone doing so, but tracking appeals is another function the office should address.

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CHAIR THERRIAULT asked whether she encountered any difficulty that would require a legislative fix.

MS. THURBON said not at this time.

CHAIR THERRIAULT recognized Robert Pearson from the Lt. Governor's Office and asked whether he had any comments.

MR. PEARSON said he was available to answer questions and had no prepared remarks.

There were no further questions.

CHAIR THERRIAULT announced that next week the committee would hear SB 12, SB 76, and a Department of Administration overview on the impact of HB 242 passed in 2001.

There being no further business to come before the committee, Chair Therriault adjourned the meeting at [4:19:47 PM](#).