

Legislative Report from the ADMINISTRATIVE REGULATIONS REVIEW COMMISSION

New York State Assembly • Carl E. Heastie, Speaker • Ken Zebrowski, Chair

Message from the Chair



Dear Friends:

The Legislature's Administrative Regulations Review Commission (ARRC) oversees the process used by New York State agencies to develop rules and regulations. Upon being appointed as the Assembly Chair of ARRC in January of 2013, I voiced my interest in ensuring that state agencies fully consider the concerns of New Yorkers as they issue new or amended regulations.

Some rulemaking issues – such as the decision to allow or ban hydrofracking – become matters of widespread public interest. Other regulations are much less visible but still have significant impacts. Under my watch rules are examined from the viewpoint of how they affect the average taxpayer, small business owner or family. When a proposal seems like could it cause headaches or require improvements, I have not hesitated to let the agency know.

This report discusses some of the more significant regulatory issues I have addressed over the past two years, often in conjunction with the chairs of standing committees or other involved legislators. It also details some legislation I have introduced to make the rulemaking process more responsive to the public. I look forward to continuing these efforts to improve the outcomes of regulatory decisions that affect all New Yorkers.

Sincerely yours,



Ken Zebrowski

Regulatory Issues

The Legislative Law charges ARRC with examining the rules adopted or proposed by state agencies with respect to consistency with the law and the potential impacts on the economy, the operations of the state and local governments, and other affected parties. The Assembly Chair of ARRC frequently comments on proposed rules that fail to follow the requirements of state law or to serve the public interest. Agencies are not required to follow ARRC's recommendations, but often see the logic of our comments and amend the rules accordingly.

Agency rulemaking activities – proposed, adopted and emergency – are reported in the New York *State Register*, which is available online as well as in many public libraries. At the end of this document the address for the Department of State's website is listed; the full text of every issue of the *State Register* and other information on rulemaking can be accessed there. Revisions to the agency's original version can be made based on public comment.

Comments and Results

Comments on proposed rules – from legislators and/or members of the public – often result in positive changes. Below are some examples from comments I submitted to various state agencies in 2013 and 2014 (more information appears in the rulemaking notice’s assessment of comments in the *State Register* issue listed after each item):

State Education Department (SED)

Moral Character Hearings for Certified School Personnel

To improve school safety, in 2013 SED adopted amendments to its rules listing those crimes that create a presumption that a teacher, principal or other school employee lacks the “good moral character” needed to maintain state certification. SED added convictions involving “fingerprint fraud” -- submitting false fingerprints or other information on an application for certification. However, the rules were drafted in a way that prevented SED from acting unless the fraud was committed “subsequent to certification” and also would have prevented SED from appealing a hearing officer’s decision in favor of the applicant. In response to my comments, the rules were amended to apply to fraud on initial applications and provide for SED appeals. (10/2/13 *State Register*)

Testing Misconduct

In 2013 rules were proposed mandating reporting to SED by school employees who witnessed or had knowledge of any staff misconduct in the administration of state-required tests -- such as accessing secure test booklets before the authorized time, creating “cheat sheets” for students or erasing or altering students’ answers. I commented that these rules only applied to school districts or BOCES employees, but did not require any reporting by charter school employees who knew of misconduct in administering state exams. SED revised the proposal to protect the integrity of tests given in charter schools. (2/12/14 *State Register*)

Department of Health (DOH)

Adult Day Health Care Programs

In 2013 DOH proposed amendments to its rules to allow adult day health care programs operated by nursing homes to also accept individuals in social adult day care programs -- older persons without medical needs but who need meals and social programs meals during the day. As part of the change, such “hybrid” programs could have exceeded their licensed capacity by 30% for months at a time. Comments from many parties were submitted expressing concern that these changes could adversely affect the quality of services provided to program participants. DOH revised the rules to delete the authority for programs to exceed capacity by 30% and to otherwise ensure that all participating seniors receive the services they need. (6/11/14 *State Register*)

Adult Homes – Posting of Grievance Procedures

In 2013 and 2014 DOH adopted a series of emergency rules to incorporate new requirements to report resident abuse and neglect to the Justice Center. In the process, a wording change deleted the requirement that all facilities must post the procedures for residents to submit grievances. Assembly comments resulted in restoration of the regulatory language requiring such posting. (7/9/14 *State Register*)

Department of Agriculture and Markets (A&M)

License Exemption for Small Cideries

In 2014 rules were proposed by A&M to exempt farms or other small businesses making hard ciders from the requirement to obtain a food processing license. The cidery would still have to follow good manufacturing and sanitary practices. Assembly comments pointed out that A&M had used an outdated definition of “hard cider” that would not let the cidery use other fruits, such as pears, or add flavorings such as maple syrup, honey and spices. A&M agreed and revised the regulation as suggested. (8/20/14 *State Register*)

Department of Economic Development (DED)

Minority and Women-Owned Business Enterprises

In 2014 the Department of Economic Development proposed to amend its rules on the utilization of minority and women-owned businesses (MWBEs) in state agency contracts. While many of the changes were worthwhile, Assembly comments pointed out that some useful tools to encourage such utilization, such as an agency’s direct negotiations with MWBE firms, would no longer be counted as “good faith” efforts. DED agreed to restore this provision. (6/4/14 *State Register*)

Office of General Services (OGS)

Service-Disabled Veteran-Owned Businesses

In 2014 we enacted historic legislation to require every state agency to award a percentage of its contracts to businesses owned by veterans with service-related disabilities. OGS proposed rules to establish a process for such awards, based on existing regulations for contract participation by minority and women-owned business enterprises. Comments I submitted with other Assembly Chairs urged OGS to include additional procedures and agency reporting that have prompted increased awards to MWBEs. OGS deferred making some of the suggested changes until it has more experience with this new program, but did agree to make improvements in agency reports and other aspects of the rules. (1/28/15 *State Register*)

Justice Center for the Protection of People with Special Needs (Justice Center)

Disclosure of Records Related to Abuse or Neglect

In 2013 the newly-created Justice Center proposed rules on handling requests involving records that relate to the abuse or neglect of a vulnerable person in the care of a state licensed or certified facility or provider agency. Assembly comments pointed out several areas where the proposal was not consistent with the requirements of the Freedom of Information Law. The Justice Center incorporated several recommendations in the final rules to preserve the ability of the public to receive timely responses to requests for records. (6/26/13 *State Register*)

Department of Labor (DOL)

Wage Deductions

In 2013 DOL issued a proposal clarifying the way employers may make and recover deductions from employees’ wages. The rules allowed additional categories of deductions, such as gym memberships, and made various changes in the rights of employers and employees. Assembly comments recommended additional safeguards on deductions from paychecks. Although it made few substantial changes to the final version, DOL did accept several of these suggestions to clarify how overpayments and advances are recouped. (10/9/13 *State Register*)

Department of Motor Vehicles (DMV)

License Plates for Disabled Veterans

State agencies are required to review their existing rules at least once every five years to ensure that they are not outdated or obsolete. In 2013 DMV reviewed its regulation on issuing special license plates to severely disabled veterans or other persons, and determined that it reflected current law and needed no changes. Our comments pointed out that the Legislature had actually made several amendments to make the process of obtaining such plates less burdensome. In response, DMV updated its regulation to add physician assistants, nurse practitioners and optometrists to the list of health professionals who can certify an applicant’s disability. (1/8/14 *State Register*)

Department of Taxation and Finance (T&F)

Child and Spousal Support Obligations

In 2013 T&F proposed rules implementing new requirements for the registration of tax return preparers. Assembly comments noted that, while the proposal properly referred to statutory provisions allowing registration to be denied when the Family Court has found a tax preparer to be in arrears on child support payments, other important legal requirements were omitted. These included language that authorizes such denial when the tax preparer is in arrears on spousal support and that allows a new applicant who owes back child support to receive a temporary registration, conditioned on full compliance with support obligations. T&F included these recommendations in the final regulations. (12/11/13 *State Register*)

Legislation

ARRC also develops legislation to make the rulemaking process in New York State more effective and more accessible to the public, and to remove or reduce the costs of complying with regulations. Below are some of the bills that were introduced in 2013-14.

Streamlined Adjudicatory Proceedings

Small businesses need to focus their energies on surviving and growing, and so state agencies that regulate them must use technology effectively to minimize any unnecessary burdens. In 2013, I succeeded in getting legislation passed to cut the cost and complexity of participation in adjudicatory proceedings by allowing agencies to offer optional streamlined proceedings to small businesses.

To avoid the costs of closing up shop and traveling to a central hearing location, some innocent businesses choose to pay a penalty instead of contesting the matter. My bill addresses this concern by encouraging agencies to offer a small business the alternative of a hearing by e-mail, telephone or video conference. It also directs three agencies (the Departments of Environmental Conservation, Health and Labor, or another agency substituted by the Governor) to undertake pilot projects to conduct such streamlined hearings. This bill was signed into law as Chapter 491 of the Laws of 2013.

Improving Job Impact Statements

When proposing a rule an agency is required to prepare a “job impact statement” analyzing its potential impacts on jobs or employment opportunities and seeking ways to minimize any adverse effects on jobs. I introduced legislation to make improvements to this process -- for example, by requiring agencies to focus on the quality of jobs, giving a preference to actions that create or maintain full-time jobs that pay a living wage. This legislation passed the Assembly in 2014 and has been reintroduced in 2015 as A.1335.

Public Petitions for Rulemaking

One change that could significantly improve our State’s regulatory climate would be to allow members of the public to initiate changes in agency rules. Many other states provide for public petitions for rule changes: so do Federal agencies and New York City agencies. My bill would allow any person to submit a petition requesting the adoption, amendment or repeal of an agency rule. If the petition is signed by 100 or more New Yorkers, the agency would be required to either issue a written denial or propose a rule. This bill has been reintroduced in 2015 as A.1586.

Banning Regulatory Enforcement Quotas

Enforcement of regulations is an important and necessary task, but it should always be practiced in a fair and unbiased manner. Assigning each inspector a quota that requires that they write up a certain number of violations is unfair to regulated entities and does nothing to protect the public. New York State already has laws that ban quotas for traffic tickets and tax enforcement. My bill would similarly prohibit the use of quotas in regulatory enforcement. This bill has been reintroduced in 2015 as A.1753.

Small Business Regulation Guides

For several years agencies have been authorized to publish “small business regulation guides” to provide small business owners and managers with plain language “how to” information on regulatory requirements. However, at present no entity is responsible for ensuring that agencies actually do so. This bill would assign such a role to the Department of Economic Development’s Division for Small Business, which is uniquely qualified to advise agencies on the information that small businesses need, including ways to avoid the most common regulatory violations. This bill has been reintroduced in 2015 as A.1765.



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State Register and Rulemaking Information

For more information on rulemaking in New York State and access to the weekly issues of the State Register, visit the Department of State website at <http://www.dos.ny.gov/info/register.htm>.

**For additional information, contact: Assemblyman Ken Zebrowski, Chair
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