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ADMN. RULES: HEARING NOTICES

House Bill 5058 as enrolled
Second Analysis (1-26-90)

Sponsor: Rep. Gary L. Randall
House Committee: House Oversight
Senate Committee: Government Operations

THE APPARENT PROBLEM:

Reportedly, the public notification requirements of the Administrative Procedures Act have resulted in some confusion as to what constitutes proper notification, as well as resulting in placing the Joint Committee on Administrative Rules in the position of having to take action on a proposed rule even in cases where notification of public hearings on the rule has not been completely carried out.

The Administrative Procedures Act contains two sections (sections 41 and 42) which deal with public notice requirements that apply to state agencies proposing to adopt administrative rules. One section (section 41) requires that, before adopting a proposed rule, a state agency give notice of public hearings on the proposed rule and requires certain time limits for such notification to be given. However, the section does not specify how such notice be given, though it does have provisions concerning what the notice must contain, to whom copies of the notice be given, and who must be at the hearing. The second section (section 42) leaves it up to the discretion of the state agency to decide the best way to notify people likely to be affected by the proposed rule, should there be no applicable law prescribing how the notice of the public hearing is to be published. The section allows state agencies ("depending on circumstances") to use a number of methods to notify people of public hearings on proposed rules, including publication of the notice in one or more newspapers of general circulation or in trade, industry, governmental, or professional publications. The section also specifies that if the people likely to be affected by the proposed rule are "unorganized or diffuse in character and location," the agency must publish the notice as a display advertisement in at least three newspapers in general circulation in different parts of the state, with one of the papers being published in the Upper Peninsula.

Reportedly, state agencies sometimes have interpreted the notification requirements of these two sections of the Administrative Procedures Act as allowing them to choose one or the other in order to fulfill the agency's public notification requirements, rather than interpreting the act as requiring the agency to fulfill the requirements of both sections. As a result, sometimes agencies have proposed rules and believed that they had given the required notice of public hearing, without yet having published the notice in more than one newspaper, or in more than one newspaper but not in a newspaper in the Upper Penninsula, or not within the required time limits.

The act presently also requires the Joint Committee on Administrative Rules to act on a rule sent to it by a state agency (after the Legislative Service Bureau and the attorney general have approved the rule and it has been published in the Michigan Register). However, there is no requirement that proper notification of a public hearing be given before the committee may be required to consider a rule, and the committee has occasionally been required to take action on a proposed rule even though all of the notification requirements of the act have not been met.

Legislation has been introduced to clarify the act's notification requirements.

In an unrelated matter, Public Acts 196 and 197 of 1984 amended the Administrative Procedures Act (APA) and the Revised Judicature Act (RJA), respectively, to provide that, in contested cases under the APA, and in civil actions involving the state, the state is liable for costs and fees incurred by the other party if that party prevails and the state's position can be shown to be frivolous. Both the acts provided a sunset date for this provision of September 30, 1987. Public Act 203 of 1988 removed the sunset from the RJA, and some people believe that the sunset date should be removed from the APA.

THE CONTENT OF THE BILL:

The bill would amend the Administrative Procedures Act to:

- remove the requirement that agencies publish notices of public hearings (on proposed administrative rules) in the form of "display" advertisements;
- set minimum standards for publishing notices of hearings;
- invalidate rules not meeting the notification requirements;
- bring certain kinds of rules applying to correctional inmates under the act's definition of "rule"; and
- eliminate the sunset date for the initiation of certain contested cases.

Public notices. The bill would strike provisions in the act which allow state agencies to decide on the best way to notify people likely to be affected by a proposed rule and which require that notices be published in the form of a display advertisement. Instead, the bill would require that, if no existing law applied, a state agency publish notices not less than ten days (instead of the present minimum of 30 days) and not more than 60 days (instead of the present 90 days) before the hearing. The notice would have to be published in at least three newspapers of general circulation in different parts of the state, one of which would have to be in the Upper Peninsula. (Presently, this is required only if the people likely to be affected by the proposed rule are "unorganized or diffuse in character and location").

Presently, the act specifies that "inadvertent failure" to give the required notification of a public hearing on a proposed rule does not invalidate the rule. The bill would strike this provision, saying instead that, with the exception of certain emergency rules, rules would not be valid unless proper notification were given.

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The bill also would allow people to present questions (as well as data, views, and arguments) before the adoption of a rule, and would require that the Joint Committee on Administrative Rules take action on a proposed rule transmitted to it by a state agency only after publication of the rule in the Michigan Register and after notice was given as required. Finally, the House and Senate fiscal agencies would be required to analyze each proposed rule for possible fiscal implications (instead of doing so only upon request of the JCAR).

Rules applying only to prisoners. Under present law, rules or policies that concern only inmates of state correctional facilities and that do not directly affect other members of the public are not considered "rules" for purposes of the Administrative Procedures Act. The bill would change this to say that such rules, if promulgated before December 4, 1986, would be considered rules under the act's provisions, but could not be amended and would remain in effect until rescinded.

Contested cases. The Administrative Procedures Act was amended in 1984 (by Public Act 196) to provide that in contested cases under the APA and in civil actions involving the state, the state would be liable for costs and fees incurred by the other party if that party prevailed and the state's position could be shown to be frivolous. The act had an effective date of September 30, 1984 and a September 30, 1987, sunset date for the initiation of cases. The bill would eliminate the sunset date.

MCL 24.241 et al

BACKGROUND INFORMATION:

Rules applying only to prisoners. On March 8, 1986, the Michigan Supreme Court held (in Martin v. Department of Corrections) that the Department of Correction's (DOC) policy for defining and punishing "major misconducts" (serious violations — such as escaping, committing a felony, possessing illegal drugs, and the like — of important prison regulations) should have been promulgated as rules under the Administrative Procedures Act (APA). The court's decision further raised the possibility that all prison regulations would have to be promulgated as rules, a time-consuming process that the department contended would be both too cumbersome for the many regulations needed to deal with the endless day-to-day problems that arise in the prison system as well as too inflexible to respond quickly to security problems as they arose. As a result of this court decision, legislation (Public Acts 243 and 271 of 1986) was passed which exempted from the administrative rules process DOC rules or policies that concerned only inmates of state correctional facilities (and that did not directly affect the public).

Contested cases. Public Acts 196 and 197 of 1984 were enacted to correct a general perception, widely held in the business community, that government agencies were often too zealous in regulating and that many of their actions amounted to little more than harassment and nitpicking. A governmental action against an individual or a business under the APA, or in a civil action before the courts, could be very expensive to the other party even if that party prevailed. Some people claimed that small businesses had been ruined by the cost of responding to government proceedings (large businesses usually maintain staffs of attorneys to routinely contest government actions against them and thus are able to bear the costs of responding to government proceedings against them). The problem was recognized by the federal government by the passage of the Equal Access to Justice Act which took effect October 1, 1981.

The APA provisions do not apply to worker's compensation cases, unemployment compensation cases, Department of Social Services public assistance hearings, or secretary of state hearings regarding driver's licenses. The act does not affect a state agency when it is acting in its role of hearing or adjudicating a case, when its action is required at the instigation of a party with a private interest in the matter or by law at the request of another person, or when its role in the case is so minor as to make liability for costs unreasonable. Further, the act requires the director of the Department of Management and Budget to report annually to the legislature on the cost of implementing the 1984 legislation.

FISCAL IMPLICATIONS:

Legal counsel for the Joint Committee on Administrative Rules notes that there may be some savings to state agencies, since the bill would strike the requirement that newspaper notices be in the form of display advertisements (which are more expensive than the notices that would be allowed under the bill). (10-3-89)

ARGUMENTS:

For:

Having public notification requirements in two different sections of the Administrative Procedures Act is confusing and has resulted in state agencies occasionally failing to publish notification of public hearings on proposed rules in the right (or the right number of) newspapers or within the required time limits. When this has happened (but when all of the other required steps have been taken as required by the act), the Joint Committee on Administrative Rules also then has occasionally wound up taking action on a proposed rule even though notification of public hearings on the rule was not properly carried out. The bill would clear up this confusion, making clear that proper notification would involve publication in newspapers across the state (including one in the UP) and that the committee could not even consider a proposed rule unless such notification had (in addition to the other requirements) been given. In addition, striking the requirement that the newspaper notices be "display advertisements" would save state agencies money, since this kind of notice is more expensive than other kinds of notices. Also, requiring the legislative fiscal agencies to do fiscal analyses of all proposed rules, rather than upon request of the Joint Committee on Administrative Rules, would reflect actual practice, since the agencies presently automatically do analyses of all proposed rules. Finally, changing the notification time limits would return the minimum limit to what it was before the creation of the Michigan Register (which comes out every 30 days and which is why the ten day limit was changed to coincide with this schedule) and would allow a more reasonable upper limit of 60 (rather than 90) days.

For:

Public Act 196 of 1984 insures that individuals and small businesses will not be ruined financially because of frivolous government actions against them, serving to deter government officials from initiating frivolous actions. Without the protection of this law, a government official has nothing to lose by bringing even the most baseless action (while yet perhaps having something to gain

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professionally). With the act, however, a regulator has to consider the merits of an action very carefully before beginning it. Public Act 203 of 1988 struck the sunset date for the provision (in Public Act 197 of 1984) as it pertained to the RJA, and this bill would do the same for the APA.

Against:

Deterrence is certainly the primary effect of Public Acts 196 and 197, but it is not clear that this is a desirable feature. By striking the sunset date in the APA the bill may well have a serious chilling effect on government regulation. Unless one believes that government regulators are malicious or incompetent, one must assume that they carry out their duties with the intent of enforcing the laws and administrative rules of the state. If a particular provision of law is obnoxious to businesses, the proper solution would be to examine and amend the specific law, not to threaten state agencies with financial retribution for attempting to enforce the law.

Response: Striking the sunset provision would only serve justice; it would not promise retribution. A person or a business subjected to a civil or administrative proceeding has already been penalized, even if that person or business prevails. When there is legitimate dispute as to the facts, the state agency will be in no danger of bearing the other party's costs even if the state should lose the case. The standard that must be met before costs can be ordered paid is one of frivolity. The action would have to be entirely without merit, and if such were the case the payment of costs would be simply justice.

For:

The bill would clarify existing rules that apply only to prisoners. When the 1986 exemption of rules applying only to prisoners was made, it left in question the status of the rules that existed at the time that applied only to prisoners, including whether — and, if so, how — these rules (that by definition were no longer rules according to the APA definition) could be amended or rescinded. The bill would clearly establish that rules in place before the 1986 legislation were, indeed, rules under the APA, and, as such, could be rescinded in accordance with the act's provisions. But at the same time, the bill would prohibit amending these pre-1986 correctional rules applying only to prisoners.