

LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES IN THE STATE OF WASHINGTON; A LIGHT THAT FAILED?

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When the legislature passes an insurance law and the Governor signs it, the gavel passes to the regulator, subject to such review as the law permits by the courts. The legislature bows out – even if the regulator is believed to have issued a rule misinterpreting the intent of the legislature when it passed the law – unless it is prevailed upon to pass another law, a long and unwieldy process. The regulator has wide latitude with respect to the interpretation of the law, whether that power derives expressly from the statute or from the practical necessities or attributes of the regulatory process.

It is almost impossible for the wisest of legislatures to anticipate every uncertainty which lurks in the crevices of the most carefully drafted statute. Many are a congeries of ambiguities. Some are inadvertent because our language is both rich in nuances and slippery in meaning. Some ambiguities result from a last minute modifying word, phrase or clause scribbled hastily on a scrap of paper by a lobbyist and handed to a friendly legislator or staff member. Some are deliberate, impelled by the practical necessity of obtaining a consensus to permit passage of a bill. Language which can be read more than one way can obtain a critical acquiescent vote while unambiguous language would prevent agreement.

After the legislature has acted, its direct power over the law and its interpretation ceases. If its members are dissatisfied with the interpretation of the law by the regulator, they must wait for a decision of a court for vindication. Any unacquiescent insurer or other party is obliged, if it doesn't like the interpretation, after exhausting all administrative remedies to: (1) grin and bear it; (2) appeal to the courts if the law permits; or (3) go back to the legislature in a later year and try to obtain a legislative reversal of the regulator's interpretation. Generally, (1) is the only practical alternative.

The State of Washington, however, has a law which was designed to permit the legislature, either on its own motion or at the request of an aggrieved party, to bring about a reversal of the regulator's interpretation of a statute under which a regulator issued a rule.¹ An amendment to the Administrative Procedure Act of the state created the Joint Administrative Rule Review Committee (the "Committee"). The statute prescribes a procedure under which the Committee can determine that a rule proposed or adopted by an administrative agency, including a rule adopted without formalities (described in the statute as "policy and interpretive statements, guidelines and documents that are of general applicability, or their equivalents" and hereinafter referred to as an "informal rule") violated the intent of the legislature when it passed the enabling act or was otherwise in violation of the law. This can be done on the Committee's own motion or on petition by any interested person.

On its surface, therefore, the Joint Administrative Rules Review Committee procedure would afford an insurer or other party complaining that a rule exceeded the authority of the Insurance Commissioner, an additional alternative to the dismal prospects outlined above. This article will consider whether the putative promise of relief from the Committee is real or illusory.

The Committee is composed of four senators and four members of the House of Representatives, evenly balanced as to political party. A majority must approve all Committee actions.²

Any interested person may petition the Committee to review "a proposed or existing rule or a proposed or existing policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent."³ The statute applies to rules issued by any administrative agency, including the Insurance Department. There is an additional prerequisite for eligibility for review of a rule: the person requesting the review must first petition the agency⁴ to change or repeal the rule and must demonstrate that the petition was denied.

Any petition for review of an existing or proposed rule must, *inter alia*, identify the rule to be reviewed and the

implicated statute or statutes,⁵ as well as demonstrate why the rule is not within the intent of the legislature or not in accordance with the law. A petition for review of an informal rule is subject to the limitation that it can only be filed for the purpose of requesting the Committee to determine whether it is being used as a rule that has not been adopted in accordance with all provisions of law.⁶

Rules may also be reviewed selectively by the Committee, which can take the same kind of action that it takes in response to a petition as well as make recommendations to the legislature.⁷ Hence, another technique which the objector could use would be to attempt to persuade the Committee to conduct a review *sua sponte*. Informal rules are also subject to selective review by the Committee, but the review is limited to determining whether they were adopted without compliance with the laws governing their adoption.⁸ If the Committee finds that an existing rule is not within the intent of the legislature as expressed in the statute, that the agency has not followed all applicable provisions of law in adopting the rule or that the agency is using a policy statement or the like in place of a rule, the Committee must notify the agency of its findings. The agency must then schedule and hold a hearing on the findings, notifying the code reviser and interested parties. At the hearing, the agency must consider all written and oral submissions. Thus, the company, agent or other proponent of the Committee's review has another opportunity to advance its opposition to the agency's action or omission.

After the agency's hearing on the Committee's findings, it must notify the Committee of what it intends to do about the faults found by the Committee.⁹ If the Committee finds that the agency's response is inadequate, the Committee may file a notice of its objections with the code reviser, and the agency.¹⁰

If the subject of the Committee's objections is an existing rule, the Committee may recommend to the Governor suspension of the rule. In that event, the Committee notifies in writing the appropriate standing committees of the legislature, the Governor, the code reviser and the agency of its recommendation. If the suspension is approved by the Governor, it is effective from the date of the Governor's approval and continues until ninety days after the expiration of the next regular legislative session.¹¹

The role of the Committee with respect to proposed rules is different from and more limited than its prerogatives with respect to existing rules or even informal rules.¹² With proposed rules, the Committee is limited to notifying the agency of its findings that the proposed rule is not within the intent of the legislature, or that the agency is not complying with all the applicable provisions of law. When the agency holds its hearing on the proposed rule, it is required to consider the Committee's decision. There is no provision for further action at that stage by the Committee if the agency adopts the rule despite the adverse findings of the Committee.

Significant omissions and differences exist in the language of RCW 34.05.640 which deals with action and the sections which deal with review. The statute uses mandatory language with respect to the duties of the Committee when review of proposed or existing rules or informal rules is requested. It *must* consider whether the petition has merit and *must*, if it finds it to be meritorious, notify the offending agency, which *must* consider its findings. If, however, the agency fails to act on the Committee's findings, the language of the statute becomes permissive. The Committee "*may*, within thirty days from notification by the agency of its intended action on an existing rule, file with the code reviser notice of its objections ... etc." (emphasis added).¹³ Further, it *may*, by majority vote, recommend to the Governor suspension of the rule. Thus, despite its findings that the intent of the legislature has been ignored or that there was a violation of the law in the adoption of the rule, the Committee is not required to seek the corrective action which the statute authorizes, except for setting out its objections.¹⁴

The question whether to take such action can become a separate political question, in the course of which the Committee may, presumably, weigh whether the deficiencies, although weighty enough to justify a required hearing by the agency and findings, is not important enough to warrant a request to the Governor to take action. What the Committee's chances of success may be; what the costs, political or economic, of the suspension might be if they achieve it; what the prospects of corrective action by the next legislature may be, or any other factors the members may deem relevant can, presumably, be considered.

As indicated above,¹⁵ the avenue of recommendation to the Governor is not open as to proposed rules. Here, the Committee is confined to notifying the agency of its findings that the proposed rule is objectionable. However, the

agency may find in the Committee's objections an implied threat that it will take the more extensive action if the rule is adopted and becomes subject to review as an existing rule.

The same failure to specify the full range of measures provided as to existing rules applies to adverse findings regarding an informal rule. Here, the statute goes one step further than its limit as to proposed rules. The Committee may advise the Governor of its findings. Nothing is said as to action that might be taken by the Governor, however.

The philosophy undergirding the legislative attempts described in this article to affect or control administrative action is indicated in the legislative findings antecedent to the Regulatory Reform Act of 1995:¹⁶

... Washington's regulatory system must not impose excessive, unreasonable, or unnecessary obligations ... To that end, it is the intent of the legislature in the adoption of Chapter 403, Laws of 1995 that: (a) Unless otherwise authorized, substantial policy decisions affecting the public be made by those directly accountable to the public, namely the legislature, and that state agencies not use their administrative authority to create or amend regulatory programs ... (e) Members of the public have adequate opportunity to challenge administrative rules with which they have legitimate concerns through meaningful review of the rule by the executive, the legislature, and the judiciary. While it is the intent of the legislature that upon judicial review of a rule, a court should not substitute its judgment for that of an administrative agency, the court should determine whether the agency decision making was rigorous and deliberate; whether the agency reached its result through a process of reason; and whether the agency took a hard look at the rule before its adoption; ... (f) ... that a cooperative partnership [should] exist between agencies and regulated parties that emphasizes education and assistance before the imposition of penalties ..."

The actual product of this bold assertion of legislative intent is quite feeble. In a reversal of President Theodore Roosevelt's famous dictum "Speak softly and carry a big stick," the legislature in establishing the Committee procedure speaks loudly but carries a small stick.

If a company, agent or other person believes that the Insurance Department has, indeed, improperly created or amended regulatory programs as envisaged by the legislature, if its petition is approved by a legislative committee equally balanced between the two parties, it can hope that the Committee will decide to forward its recommendations to the Governor, who may or may not order the suspension of the questioned rule. Some alleged abuses would not even be eligible for that remedy. In some instances of relief sought under the statute, the Governor's action would be limited to recommendations to the agency.¹⁷ The statute permits the Committee to publicize its opinion, however, the possibility of which might have some inhibitory effect on the agency.

If the sanctions allocated to the Committee were stronger, constitutional questions could well arise concerning separation of powers. In fact, the power awarded the Governor to suspend, at the behest of a mere committee of the legislature, a rule adopted by an elected official such as the Insurance Commissioner may, even in its present form raise constitutional questions if it were exercised. The legislature showed some sensitivity to the threat of exposure to constitutional questions when, apparently to preclude an attack based on a claim of invasion by the legislative branch of the prerogatives of the judicial branch, provided¹⁸ " ... that establishment of procedures for review of administrative rules by the legislature and the notice of objection required by RCW 34.05.630(3) and 34.05.640(2) in no way serves to establish a presumption as to the legality or constitutionality of a rule in any subsequent judicial proceedings interpreting such rules." With that language, it amended an earlier, more ambitious version.

While it may be disappointing to its proponents, the fact is that in practice the work of the Committee has been confined largely to receiving routine copies of rules and reviewing them or conducting negotiations aimed at persuasion¹⁹ may reflect the true limits of the efficacy of the statute creating the Committee. It may have precluded some protracted litigation over the validity of the program, which has never been tested by an appellate court. Or, despite the continuing complaints of the regulated, the absence of any history of formal action by the Committee may indicate that this legislative bureaucracy, by its hortatory and admonitory power, may have encouraged the administrative bureaucracies to walk in the paths of righteousness. Quien sabe?

Endnotes

1. RCW 34.05.610 *et. seq.*, and particularly RCW 34.05.630, RCW 34.05.655. Many states provide for legislative review of administrative rules. Some, like Illinois, Iowa, Maryland, Louisiana, Virginia and Wisconsin, authorize review of both proposed and existing rules. Others, like Michigan, Missouri, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota and Tennessee, provide for review only of proposed rules. A legislative committee, usually but not always, joint and bipartisan, is authorized to review the administrative rules, and may delay or suspend their implementation. Generally, the full legislature must veto the rule if the statute gives it the power, sometimes with the concurrence of the Governor. Procedures and powers vary widely among the states, but all these measures can be said to stem from a movement for regulatory reform designed to relieve American businesses and individuals from what is perceived to be bureaucratic red tape. There are probably no other states which articulate as extensively as does the State of Washington procedures for the lodging of petitions by the general and corporate public for the review of, and relief from, rules which are believed to be not only burdensome, but contrary to the intent of the legislature when it enacted the statutes upon which they are based.
2. RCW 34.05.655.
3. RCW 34.05.655.
4. RCW 34.05.655(2). Under RCW 34.05.330, the petitioner to an agency is given the option, if the petition is refused, of petitioning the Governor directly instead of appealing to the Committee. Presumably, the petitioner could do both.
5. RCW 34.05.655(3)(b).
6. RCW 34.05.655(2).
7. RCW 34.05.630 and RCW 34.05.650.
8. RCW 34.05.630(2).
9. RCW 34.05.640(1).
10. RCW 34.05.640(2).
11. RCW 34.05.640(3)(a).
12. RCW 34.05.620.
13. RCW 34.05.640(2)(c).
14. While the Committee may, under RCW 34.05.650, recommend to the legislature changes to a law which might accomplish a reversal of the administrative rule, that action would not accomplish the timely though temporary relief contemplated by the statute.
15. *See* RCW 34.05.620
16. Wash Laws of 1995, Ch 403, Sec. 1; RCW 34.05.328.
17. RCW 34.05.330(3)(c).
18. RCW 34.05.660.

19. In its publication, *The Rule Review Process: An Overview*, available on the Internet, the Committee emphasizes, in describing its mission, that its primary charge is the selective review of agency rules to see if they conform to the intent of the legislature manifested in the statutes on which they are based, and also that it may review rules to determine if they comply with the Regulatory Fairness Act (Chapter 19.85 RCW), and particularly economic impact statements required for small business. In a summary of its policies, the Committee stated that “The Committee’s approach is to seek negotiation of an issue. Many of the inquiries to Committee members and staff are resolved before reaching the stage of a formal hearing ... Staff is directed to assist interested parties in attempting to resolve disputes over administrative rules ...” From time to time petitions are filed with the Committee, raising objections to agency rules, or inquiries are made to the Committee concerning such rules. Since the act creating the Committee was passed in 1981, only two notices of objection by the Committee have been filed by the Committee with the code reviser and published in the Washington Administrative Code (WAC 388-4380100 and WAC 390-20-110, filed, respectively, in 1984 and 1987). Neither resulted in any change in the rule to which the Committee objected. The paucity of filed objections indicates strongly that all petitions were denied *ab initio* by the Committee, failed because the Committee declined to take further action, or disposed of informally by negotiation.