

# **ADMINISTRATIVE RULE REVIEWS**

## **BACKGROUND**

Administrative rule reviews (ARR) are practiced in some fashion by a large number of states, so Wyoming is not unique in conducting a review of agency rules. The topic is covered in detail in the Administrative Rule Review Handbook, a copy of which has been distributed to every member of Management Council (Council). This is a brief overview of the process. A practical discussion of the benefits of the ARR process is at the end of this overview.

## **ARR PROCESS**

### **Legislative Service Office Review**

Statutes require that no non-emergency rule may be filed with the Secretary of State unless first submitted to the Legislative Service Office (LSO) for review. The LSO receives copies of proposed rules for preliminary review, and then receives rules adopted by agencies within 10 days after their adoption. The LSO then reviews the rules analyzing the following:

1. Does the agency have statutory authority to promulgate the rules?
2. Has the agency complied with statutory procedures for properly adopting the rules?
3. Do the rules otherwise meet applicable statutory and constitutional standards?
4. Are the rules within the scope of statutory authority and legislative intent?
5. Are the rules reasonable?
6. Are there any technical errors?

The first four points are required to be considered by law. The fifth point regarding reasonableness is intended to ensure the rules are not arbitrary, capricious or irrational and subject to legal challenge. The sixth point is analyzed as a matter of courtesy and convenience.

When preparing rule reviews, the LSO staff may discuss issues with members of the Attorney General's Office and agency staff. In many cases, issues regarding rules are resolved before the rule review is finalized and sent to the Council.

## Management Council Review

### *Ballot Procedure for Consideration of Rules*

Beginning in 1995, Management Council approved an expedited review process for certain agency rules. Under the procedure, the Council uses ballots to take action on many rules which otherwise would not be acted upon until the next regularly scheduled Council meeting. The process is intended to:

- Provide for more timely action on rules through weekly ballots as opposed to holding rules (especially non-controversial ones) until the next Council meeting – sometimes a delay of three or four months.
- Decrease the large number of rules that were previously sent to Council members for consideration at one time.
- Limit the rules the Council must deal with at a meeting to those in which significant problems have been identified.

**Procedures:** Each week, the LSO e-mails a rule review packet to each Council member. This packet contains the following items and is subject to the following procedures:

- **CONSENT LIST RULES.** Consent List rules are those which the LSO has found to be constitutional and within the statutory authority granted.
  - A Council member has 10 days after the rules are e-mailed to remove a rule from the Consent List for any reason. (**NOTE:** A member of the Council who has questions about a rule or needs additional information may contact the LSO staff member who drafted the rule review. It is not necessary to remove the rule from the Consent List simply to have questions answered. Removal of a rule from the Consent List should mean a Council member has determined some problem exists with respect to the rule, not merely that a member has a question.)
  - Rules removed from the Consent List will be considered at the next Council meeting. Rules not removed from the Consent List will be deemed to be approved by the Council.

- **NON-CONSENT LIST RULES.** Non-Consent rules are rules the LSO has found to contain constitutional problems, have lack of statutory authority or procedural errors. Council members vote for one of the following three alternatives for each Non-Consent rule:
  - *Adopt the LSO Recommendation.* This is a vote to adopt the recommendation of the LSO staff contained in the LSO Rule Review Report. If a majority of the Council selects this alternative, a letter will be sent to the Governor requesting he direct the agency to take appropriate action in response to the issues raised in the LSO Rule Review Report. By statute, the Governor is provided authority to disapprove any portion of a rule. Consequently, the LSO recommendation often is that the Governor exercise his “veto” authority to cure the problem identified.
  - *Approve Rule As Submitted.* This is a vote to approve the rules as submitted by the agency and to disregard the issues raised in the LSO Rule Review Report. If a majority of the Council selects this alternative, the Governor will be notified the Council approved the rule as submitted by the agency without any recommendation for change.
  - *Postpone Action.* This is a vote to indicate the Council should discuss the rules at the next meeting. If a majority of the Council selects this alternative (or if a majority of the Council fails to agree on one of the three alternative actions) further action on the rule will be postponed until the next Council meeting.
- **EMERGENCY RULES.** Emergency rules are presented to the Council for information purposes only and the Council will ordinarily take no formal action.

### ***Consideration of Rules at Management Council Meeting***

Rules that have been postponed for consideration at the next Council meeting are handled in accordance with the following procedures:

- The Council will consider any rules that have been postponed for consideration, including rules removed from the Consent List at a Council member’s request and Non-Consent List rules the Council has voted to postpone. Representatives of the Attorney General’s Office and the agency

are requested to attend the Council meeting to answer questions or respond to objections relating to any rule in this category.

### ***Council Action***

Given the constitutional doctrine of separation of powers, the Council cannot simply disapprove rules and thereby forbid their implementation. The applicable statutes limit the Council to the following initial action as a practical matter:

- Motion to lay back or table consideration of the rules to a later time in order to obtain additional information. (**NOTE:** This does not prevent the agency from filing or enforcing the rules.)
- Motion to approve the rules as written.
- Motion to recommend the Governor exercise his partial veto authority or direct the agency to rescind the rules or to amend the rules to address the concerns raised in the LSO Rule Review Report, or as otherwise specified by the Council. (**NOTE:** This does not prevent the agency from filing or enforcing the rules.)

If a motion to recommend the Governor direct the agency to rescind or modify the rules passes, the Governor is required by law to either follow the Council's recommendation or provide the Council written reasons why he decided not to do so.

If the Council does not agree with the Governor's action, it can:

- Sponsor a Legislative Order – it is processed exactly like any other legislation, and if enacted into law, would render the questioned rules unenforceable.
- Introduce legislation clarifying legislative intent or directly prohibiting what the questioned rules authorized.

## **PRACTICAL BENEFITS OF THE ARR PROCESS**

Rules may be promulgated only as a result of statutory authority. The ARR process ensures the Legislature is made aware of and reviews every new rule and modification or repeal of existing rules undertaken by all Executive agencies. This institutionalizes a procedure so Council members and all other legislators may know about all rules flowing from agency interpretation of statutes.

Since agencies know all rules will be reviewed and they may have to appear before the Council, they are more likely to carefully interpret statutes in deciding to promulgate rules.

The ARR process provides an opportunity to correct rules that exceed statutory authority or otherwise exceed constitutional or statutory authority without litigation. Issues raised in the course of discussions with the Attorney General's Office staff during the preparation of ARRs have resulted in numerous issues being resolved before the rules are even presented to the Council for consideration.

The Governor is provided an additional opportunity to reflect upon the statutory and constitutional soundness of agency rules. In some cases, he has agreed in whole or in part with the Council's recommendation and exercised his partial veto authority or directed the rules be changed.

At times, discussions about rules have resulted in the identification of administrative difficulties, policy concerns and statutory inconsistencies. After identification, a variety of responses have occurred including the Council sponsoring legislation, the Council directing a committee to consider legislation and the Governor and the agency taking administrative action to address these issues.