Office of Legislative Legal Services

Colorado General Assembly

Director
Dan L. Cartin

Deputy Director
Sharon L. Eubanks

Revisor of Statutes
Jennifer G. Gilroy

Assistant Directors
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

Publications Coordinator
Kathy Zambrano

Colorado State Capitol
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716

Tel: 303-866-2045 Fax: 303-866-4157
Email: olls.ga@state.co.us

Managing Senior Attorneys
Jeremiah B. Barry, Duane H. Gall, Christine B. Chase, Jason Gelender, Michael J. Dohr, Robert S. Lackner, Gregg W. Fraser, Thomas Morris

Senior Attorneys
Brita Darling, Jery Payne, Edward A. DeCecco, Jane M. Ritter, Kristen J. Forrestal, Richard Sweetman, Kate Meyer, Esther van Mourik, Nicole H. Myers

Senior Attorney for Annotations
Michele D. Brown

Staff Attorneys
Jennifer A. Berman, Yelana Love

FROM: Debbie Haskins

RE: Explanation of S.B. 15-100, the Rule Review Bill

DATE: March 26, 2015

I. Explanation of the rule review process

Since 1976, executive agencies have been required by section 24-4-103 (8) (d), C.R.S., of the Administrative Procedure Act to submit their rules and regulations to the General Assembly for review.

Under section 24-4-103 (8) (c) (I), C.R.S., all rules adopted or amended during any one-year period that begins each November 1 and continues through the following October 31 shall expire on the May 15 that follows such one-year period, unless the General Assembly by bill acts to postpone such expiration.

Every newly adopted or amended rule is submitted by the adopting agency to the Office of Legislative Legal Services, where it is reviewed by an attorney to determine if the rule is within the agency's rule-making authority and consistent with law. If a possible problem is found, and if the attorney is unable to resolve the problem with the agency, the attorney will take the issue before the Committee on Legal Services after notice to the affected agency. The attorney prepares a memo on the issue and makes a presentation to the Committee at a public meeting explaining why the rule lacks statutory authority or conflicts with the law. At the same meeting, the agency is given an opportunity to present its position about whether the rule is within its statutory authority or is consistent with the law. Occasionally testimony is taken from members of the public or other interested parties. After hearing all the testimony and asking questions, the Committee then takes a vote to determine whether the agency has exceeded its statutory rule-making authority or whether the rule conflicts with other laws.

Each year the Committee sponsors a bill that extends the rules adopted or amended during the previous year (i.e., those rules scheduled to expire on May 15), except that the bill specifically allows the expiration of those rules determined by the Committee to exceed

the agency's statutory rule-making authority or to conflict with law. S.B. 15-100 is the Committee's annual rule review bill for 2015.

II. Explanation of S.B. 15-100.

The following is an explanation of each rule not extended by S.B. 15-100. The rules are listed below in the order listed in the bill:

1. Rules of the State Board of Parole, Department of Corrections, concerning the state board of parole and parole procedures, 8 CCR 1511-1 (LLS Docket No. 140029; SOS Tracking No. 2013-01039). S.B. 15-100: Subsection (1) (b)

   Staff: Michael Dohr

   Explanation: Section 17-2-201 (4) (f), C.R.S., authorizes the state board of parole to conduct a file review parole hearing in only 2 circumstances. Rule 10.02 authorizes file review parole hearings when the inmate has been convicted of a class I code of penal discipline infraction within 12 months of the scheduled parole hearing and when the inmate is within 6 months of his or her mandatory release date. These two circumstances in the rule are not in the statute. The circumstances in the statute are exclusive and the parole board lacks the statutory authority to authorize additional circumstances for file review.

   Agency Position: The parole board disagreed with the staff conclusion. The parole board argued that section 17-2-201 (4) (f) (I), C.R.S., allows an exception for "exigent circumstances", that the law only specifically requires a parole hearing for an inmate's initial interview with the board, and that reconsideration may be made through a file review under the circumstances set forth in the rule. The parole board also argued that section 17-22.5-403 (1), C.R.S., authorizes the executive director of the department of corrections to promulgate guidance for extending an inmate's parole eligibility date.

   Subsequent Developments: HB 15-1122, sponsored by Representative Fields and Senator Cooke, addresses one but not both of the issues identified in Rule 10.02. HB 15-1122 amends section 17-2-201 (4) (f) (I),C.R.S., to allow a file review hearing when the inmate is within 6 months of his or her mandatory release date. The bill also changes the statute to say that a person who has committed a code of penal discipline infraction is no longer eligible to apply for a parole hearing. Since this statutory change takes a different approach than the procedure in the rule addressed in the Rule Review Bill, staff recommends that Rule 10.02 remain in the Rule Review Bill and expire as provided in the Rule Review Bill. HB 15-1122 was signed into law on March 20.

2. Rules of the State Board of Education, Department of Education, concerning administration of the "Colorado Educator Licensing Act of 1991", 1 CCR 301-37 (LLS Docket No. 140259; SOS Tracking No. 2013-01195). S.B. 15-100: Subsection (1) (c)

Staff: Julie Pelegrin

Explanation: Section 22-60.5-111 (9), C.R.S., directs the department of education to issue a career and technical education authorized to a person who holds a career and technical education credential issued by an institution of higher education with the state system of community and technical colleges. Rule 4.04 conflicts with the statute because it authorizes the department to issue a career and technical education authorization to a person who meets requirements established by the department that apparently do not include holding a credential issued by an institution of higher education.

Agency Position: The State Board of Education agreed with the staff conclusion.

Subsequent Developments: HB 15-1170, sponsored by Representatives Kraft-Tharp and Wilson and Senator Heath, changes the statute but in a way that does not authorize the rules addressed in the bill. Therefore, the staff would recommend that the rules be allowed to expire with the result that the State Board of Education would need to adopt new rules based on the new statutory language if HB 15-1170 passes in its current form. HB 15-1170 is currently in the House Appropriations Committee.

3. Rules of the State Board of Human Services, Department of Human Services, concerning restricted use of electronic benefits transfer cards for the Temporary Assistance for Needy Families/Colorado Works program and financial cash benefits, 9 CCR 2503-5 and 9 CCR 2503-6 (LLS Docket No. 140496; SOS Tracking No. 2014-00601). S.B. 15-100: Subsection (1) (f) (I)

Staff: Brita Darling

Explanation: Section 26-2-104, C.R.S., contains the locations where electronic benefits transfer (EBT) card cash withdrawals from automated teller machines (ATMs) are prohibited by persons receiving Colorado Works benefits. The state board has exceeded its statutory authority by including marijuana shops as an additional location where EBT card use from an ATM is prohibited. Second, the rules are confusing and potentially misleading to county administrators and clients because they do not include prohibited locations under Colorado law and create uncertainty as to whether there are additional locations where EBT card use is prohibited.

Agency Position: The Department of Human Services agreed with the staff recommendation.

Subsequent Developments: SB 15-065, sponsored by Senator Marble and Representative Nordberg, amends section 26-2-104, C.R.S., to extend the prohibited places to establishments licensed to sell marijuana and marijuana-infused products and at adult-oriented entertainment establishments. This bill would not completely address all of the Committee's concerns. SB 15-065 has passed the Senate and is assigned to the House Public Health Care & Human Services Committee.

4. Rules of the State Board of Human Services, Department of Human Services, concerning the Low-Income Energy Assistance Program ("LEAP") Updated, 9 CCR 2503-7 (LLS Docket No. 140564; SOS Tracking No. 2014-00899). S.B. 15-100: Subsection (1) (f) (II)

Staff: Brita Darling

Explanation: Section 26-2-104, C.R.S., contains the locations where electronic benefits transfer (EBT) card cash withdrawals from automated teller machines (ATMs) are prohibited by persons receiving LEAP benefits. The state board has exceeded its statutory authority by including adult-oriented establishments and marijuana shops as additional locations where EBT card use from an ATM is prohibited. Second, Rule 3.751.44 is confusing and potentially misleading to county administrators and LEAP clients because it does not include prohibited locations under Colorado law and creates uncertainty as to whether there are additional locations where EBT card use is prohibited.

Agency Position: The Department of Human Services agreed with the staff recommendation.

Subsequent Developments: SB 15-065, sponsored by Senator Marble and Representative Nordberg, amends section 26-2-104, C.R.S., to extend the prohibited places to establishments licensed to sell marijuana and marijuana-infused products and at adult-oriented entertainment establishments. This bill would not completely address all of the Committee's concerns. SB 15-065 is pending 2nd Reading in the House.

5. Rules of the Colorado Oil and Gas Conservation Commission, Department of Natural Resources, concerning practice and procedure, 2 CCR 404-1 (LLS Docket No. 140483; SOS Tracking No. 2014-00587). S.B. 15-100: Subsection (1) (k) (A) - (H).

Staff: Thomas Morris

Explanation: Several of the rules contain penalties for violations but do not reflect changes to the statute that were enacted by the General Assembly in H.B. 14-1356. Second, Rule 710 refers to a $4 million cap for the two-year average of the unobligated portion of the oil and gas conservation and environmental response fund. This rule fails to reflect that the General Assembly increased the cap from $4 million to $6 million in H.B. 14-1077. Third, some of the rules fail to comply with the requirements in the State Administrative Procedure Act for incorporation by reference of materials referred to in the rules.

Agency Position: The Department agreed with the staff recommendations. A representative of the Commission testified that the Commission has been working to repromulgate the rules and address the issues that OLLS staff found.

Subsequent Developments: The Commission has repromulgated rules to fix the all of these rule issues.

6. Rules of the State Board of Health, Department of Public Health, concerning the medical marijuana health research grant program, 5 CCR 1006-2 (LLS Docket No. 140552); SOS Tracking No. 2014-00743). S.B. 15-100: Subsection (1) (m) (I) (A) and (B)

Staff: Michael Dohr

Explanation: Section 25-1.5-106.5 (3) (a) (I), C.R.S., only permits the medical marijuana scientific advisory council to provide a peer review process for medical marijuana research grants and to make recommendations for grant proposals. Regulation 6. D. 3. requires the council to review petitions to add additional debilitating medical conditions to the list of conditions eligible for medical marijuana use and make corresponding recommendations. The council lacks statutory authority to also review debilitating medical conditions petitions. The board lacks the statutory authority to enlarge the jurisdiction of the council.

Section 25-1.5-106.5 (2), C.R.S., requires the state board of health to promulgate rules for timelines for the grant application process. Regulation 14. A. 2. fails to state timelines or time periods for the process and delegates the authority to determine the timelines to the department. The board has no authority to delegate this responsibility to the department.

Agency Position: The State Board disagreed with the staff recommendation. The council is an advisory council and it has the expertise to assist the department. The department has the authority to empanel a body to assist them and have the same

group as on the advisory council. The board also stated that the timelines for the grant process were well-known and well-announced.

7. Rules of the Division of Motor Vehicles, Department of Revenue, concerning Rule 8 - Driver testing and education program rules and regulations, 1 CCR 204-30 (LLS Docket No. 140296; SOS Tracking No. 2013-01120). S.B. 15-100: Subsection (1) (p) (I) - (J)

Staff: Jery Payne

Explanation: In 1991, the General Assembly passed H.B. 91-1078, which provided for a repeal through the sunset process of the regulation of commercial driving schools and instructors. The sunset report recommended that commercial driving schools should be deregulated and provided for the repeal of most of the licensing statutes governing commercial driving schools. Under the revised statutes, the department's authority to regulate under section 12-15-116, C.R.S., is limited to curriculum, equipment, records, and contracts. Another statute, section 42-2-111 (1) (b), C.R.S., authorizes the Department to certify driving schools that administer testing.

The problem with the rules is that the rules lump different classes of schools together. Some driving schools teach driving only and others teach driving *and* administer driving tests. If a school teaches just driving, it is regulated under section 12-15-116, which has a more limited regulatory scheme after the repeal of many statutes under the sunset process. If a school also administers driver's license tests, the school falls under authority granted in section 42-2-111 (1) (b), C.R.S., for the department to certify those schools that do testing.

Since the rules lump the two classes of schools together, the rules result in applying requirements to driving schools that are no longer supported by the statute. The types of requirements that should not be applied to schools that only teach driving are things such as liability insurance requirements, surety bond requirements, the name of the schools, the fitness of the instructors, background checks of employees, notification of assessment of points against driver's licenses, notification of an employee's change in driving status or leaving employment, and a code of conduct.

Agency Position: The department agreed with the staff recommendation that the rules should more carefully state which types of schools are being regulated and under what statutory authority.

8. Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 140595; SOS Tracking No. 2014-00684). S.B. 15-100: Subsection (1) (q) (I) - (III)

Staff: Jason Gelender

Explanation: Section 24-72-305.6 (2), C.R.S., authorizes county clerks and recorders to request at their discretion the criminal history records for election judges serving in the county. Rule 6.5 and Rule 6.4.1 conflict with the statute because they require the county clerks and recorders to require criminal history record checks of supervisor judges.

Section 24-72-305.6, C.R.S., requires criminal history records checks of election personnel to be accessed directly through the public website maintained by CBI and imposes this requirement to perform the checks upon clerks or county sheriffs. Rule 6.5 (a) sanctions the acquisition of criminal history records through parties or processes not allowed by the statute and therefore conflicts with the statute.

Agency Position: The Secretary of' State's Office agreed with the staff recommendations.

9. Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 140595; SOS Tracking No. 2014-00684). S.B. 15-100: Subsection (1) (q) (IV) (this rule relates to third party delivery of mail ballots)

Staff: Jason Gelender

Explanation: Rule 7.2.6 requires that each mail ballot return envelope must include an affirmation relating to third party delivery:

> "For third party delivery: I am voluntarily giving my ballot to (name and address for delivery). I have marked and sealed my ballot in private and have not allowed any person to observe the marking of the ballot, except for those authorized to assist voters under state or federal law."

Section 1-7.5-107 (4) (b) (I) (B), C.R.S., allows an eligible elector to deliver his or her ballot to any person of the elector's own choice for mailing or personal delivery; except that the statute states that no person may receive more than 10 ballots for third party delivery.

The OLLS staff reviewed Rule 7.2.6 and took the position that the rule was within the secretary of state's authority under section 1-7.5-106 (1) (a), C.R.S., to prescribe the form of materials to be used in the conduct of mail ballot elections, and under section 1-7.5-106 (1) (b), C.R.S., to establish procedures for conducting mail ballot elections. The OLLS recommended that the rule be extended.

At the meeting in December, a member of the Committee made a motion regarding the rule, the Committee discussed the rule, and the Committee voted not to extend the rule.

Opponents of the rule argue that this affirmation infringes on the right of the eligible elector to vote in private because it says the voter has to affirm they have voted in private when there is no statutory obligation to do so. The rule infringes on the voter's right to give a ballot to a third party for delivery and puts an extra burden on voters. Opponents of the rule also said that the Secretary of State has no authority to require an affirmation to be signed in order to carry out the third party delivery.

Agency Position: The secretary of state's office disagreed with the Committee's action but did not send a representative to the hearing.