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FISCAL IMPACT REPORT

ORIGINAL DATE 2/15/07

SPONSOR Park LAST UPDATED _____ HB 729

SHORT TITLE Administrative Negotiated Rulemaking Act SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 685

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Commission of Public Records
 General Services Department (GSD)
 New Mexico State University (NMSU)
 State Personnel Office (SPO)
 New Mexico Finance Authority (NMFA)
 Tourism Department
 Regulation and Licensing Department (RLD)
 Medical Board
 Board of Licensure for Professional Engineers and Surveyors
 Energy Minerals and Natural Resources (EMNRD)
 Human Services Department (HSD)
 State Land Office (SLO)
 Department of Labor (DOL)
 Department of Health (DOH)
 NM Environment Department (NMED)
 Children, Youth and Families Department (CYFD)
 Department of Military Affairs
 Corrections Department (CD)
 Department of Public Safety (DPS)
 Public Education Department (PED)

Department of Game and Fish (DGF)
Aging & Long Term Services Department (ALTSD)
Workers' Comp Administration
Commission on Higher Education (CHE)
Secretary of State (SOS)

SUMMARY

Synopsis of Bill

House Bill 729 enacts the “Administrative Negotiated Rulemaking Act” which would allow a state agency with rulemaking authority to establish a rulemaking committee to negotiate and develop a proposed rule if the agency determines that the use of the negotiated rulemaking procedure is in the public interest. An agency may also use an impartial “convener” to assist the agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking.

If an agency decides to establish a negotiated rulemaking committee, the agency must notify the public by publishing in the New Mexico register and, as appropriate, in trade or other specialized publications. The bill provides for the contents of that notice. The agency may also use a facilitator for any committee negotiations with respect to the proposed rule.

By July 2008, and by July of each year thereafter, each state agency must prepare a written report to submit to the Governor, President Pro Tempore of the Senate and Speaker of the House of Representatives regarding the number of rulemaking proceedings engaged in by the agency, whether negotiated rulemaking under the Administrative Negotiated Rulemaking Act was considered and used, whether negotiated rulemaking under the Administrative Negotiated Rulemaking Act was either successful or unsuccessful and a brief explanation as to why such negotiated rulemaking was either successful or unsuccessful.

The Governor, by Executive Order, may exempt an agency from one or more provisions of the act.

FISCAL IMPLICATIONS

House Bill 729, according to the Commission of Public Records, could have a fiscal impact on the Commission of Public Records because notices of negotiated rulemaking would be published in the New Mexico Register, which the Commission publishes. This could provide some, likely minor increase in revenues from publication (see note under the Revenue table). However, if many agencies decide to create committees, the work load for publishing the New Mexico Register would also increase. It is difficult to estimate how many agencies will create committees since participation in the process is voluntary and the process itself seems complicated; therefore the direct impact on the Commission cannot be determined at this time. Like other agencies, the Commission would have to file a report once a year on negotiated rulemaking. The compilation of that report could have a small fiscal impact on the agency.

SIGNIFICANT ISSUES

The Attorney General’s Office points out that most, if not all, state agencies have statutory rule

making authority. The new act, without harmonizing with existing laws, is likely to create substantial confusion among lawyers, licensees, administrators and the public. Most of the provisions of this bill appear to be permissive and not mandatory, with the exception of the annual report requirement. However, the Governor is authorized to exempt an agency from any of the requirements of the new act, which presumably includes the annual reporting requirement.

According to Regulation and Licensing, boards and commissions currently have authority to appoint rulemaking committees to propose rules. Committee members may or may not be board or commission members and the board or commission may or may not adopt the proposed rules. The hearing process already provides the public an opportunity to be heard and their input becomes part of the rulemaking record. Other than the reporting requirement, there is no new authority granted to boards or commissions and since the language does not require a board to use the negotiated rulemaking process there is no new agency responsibility.

NMED, along with most of the responding agencies list the following issues:

1. Establishing a negotiated rulemaking and participating in the negotiations would significantly delay the promulgation of rules by state agencies.
2. Engaging in a negotiated rulemaking would result in a substantial increase in costs to state agencies for rulemakings.
3. Consistent public participation in committees is difficult to attain.
4. The term “rule” is defined rather broadly, and conceivably could include an agency’s process of interpreting and applying rules.

PERFORMANCE IMPLICATIONS

Commission of Public Records offers that since most of the provisions of this Act would only affect those agencies that choose to follow it, most of the performance implications would be voluntary. The provisions of Section 9, however, would require a report once a year from each agency. The compilation of those reports could increase the work load of agencies.

GSD adds that this reporting requirement would place a new annual reporting requirement on agencies. Additionally, because the Act prohibits judicial review of the "negotiated rulemaking committee" process, the constitutionality of the Act would probably be called into question as violating the due process requirements of Art. II, Section 18 of the New Mexico Constitution if a life, liberty or property interest is adversely affected by that process without the possibility of court review.

ADMINISTRATIVE IMPLICATIONS

If, offers Regulation and Licensing, a rulemaking agency determines it is in the public interest to establish a negotiated rulemaking committee to develop proposed rules the administrative responsibility to publish notice for committee membership, application review to choose committee members, staffing the committee to ensure committee conduct and provide technical assistance, and the administration necessary to cover committee expenses would significantly impact the agency to the point that it may not be administratively possible to implement.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This Act should be viewed in conjunction with the Administrative Accountability Act (H 685),

Section 4 (B), as it concerns rulemaking's impact on small businesses. The effect of these two Acts together may impact the makeup of a rulemaking negotiated committee when rules impacting small business are under consideration.

TECHNICAL ISSUES

The Tourism Department reports that this bill does not specify a process for resolving possible conflicts between boards or commissions with rulemaking authority whose budget is controlled by an agency to which they are attached or which administers the fund that comprises the budget of the board or commission, i.e. what happens if the board or commission wants to engage in negotiated rulemaking but the agency does not and will not pay for the process?

The Medical Board notes that it is difficult to determine if the negotiated rulemaking process is to be used prior to the existing proposal/public comment/public rule hearing process, to assist the agency in developing the earliest proposed rule language, or if it is intended to replace or be an alternative to that process. This lack of clarity begins in the contradictory definitions of 'negotiated rulemaking' and 'negotiated rulemaking committee,' and continues throughout the bill. If the negotiated rulemaking process is to provide the agency with initial proposed rule language, then HB 729 may expand public input. If the process is to be used as an alternative to the existing public process, then HB 729 represents a significant narrowing of public input.

OTHER SUBSTANTIVE ISSUES

The Tourism Department suggests that the authority of the governor to grant exemptions to "all or part" of the Act by executive order is likely to create unintended consequences in the form of requests for partial exemptions to various requirements that, if granted, will forfeit the procedural uniformity intended by the Act. Since negotiated rulemaking is purely optional with the agency, agencies will have no reason to ask for a blanket exclusion from the governor, but will be motivated to request piece-meal changes.

The Labor Department notes that the Act is silent as to whether an agency must accept the consensus reached by the committee or if the if statutory authority to create rules and regulations of the agency is usurped by this committee.

The Secretary of State reports that this bill does not apply to the Office of the Secretary of State.

ALTERNATIVES

According to the Commission of Public Records, the federal rulemaking process is much more complicated than that used in New Mexico and many other states. Accordingly, the federal negotiated rulemaking process is much more complicated than what most of states follow. Similar provisions in other states tend to be much shorter and simpler than the text of HB729. It may be advantageous to determine if such a detailed process is necessary in New Mexico. The Model State Administrative Procedure Act may provide some guidance on a simpler process that could be used. The text from the draft copy of the revised Model State Administrative Procedure Act is as follows:

SECTION 303. ADVICE ON POSSIBLE RULE BEFORE NOTICE OF PROPOSED RULE ADOPTION.

(a) An agency, before notice of the proposed adoption of a rule, may solicit comments and recommendations from the public on a subject matter of possible rulemaking under active consideration within the agency by causing notice of possible rulemaking on the subject matter to be published in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) Before publication of a notice of the proposed adoption of a rule, each agency may appoint a committee to comment or to make recommendations on the subject matter of a possible rulemaking under active consideration within the agency. In making the appointments, the agency shall seek to establish a balance in representation among interested stakeholders and the public. The agency shall publish a list of all committees with their membership at least [annually] in the [administrative bulletin].] Notice of meetings of committees appointed under this section shall be published in the [administrative register] at least 15 days prior to the meeting. Meetings of committees appointed under this section shall be open to the public.

The State Land Office is trustee of a federal trust. SLO explains that it is bound by certain federal statutory and common laws, such as the Enabling Act. Any rulemaking at SLO must take into consideration the federal law governing the agency in addition to the New Mexico Constitution, statutes, and common law that also apply. Committee members and facilitators would probably need to be educated about the unique federal and state laws governing our agency, as well as the laws governing the fiduciary duty of a trustee to its beneficiaries. That would place additional financial and administrative burdens and time constraints on our agency. Due to SLO's current rulemaking requirements, the State Land Office should be exempted from complying with the proposed Act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Boards and commissions will continue to ensure public input and safety using current rulemaking standards under the open meetings act, the uniform licensing act, the open records act, enabling statutes and other statutory requirements.

POSSIBLE QUESTIONS

It is likely that any committee established pursuant to the new act would be subject to the Open Meetings Act as a policy-making body. In fact, the bill opens up an agency or commission to brand new avenues of legal exposure: (a) can a party sue because the convener or facilitator is bias? (b) can a party sue because the announcement of negotiated committee was not published in the correct trade magazine? (c) can a party sue because the agency did not adopt the committee recommendations? (d) can a party sue because they were left out of the negotiated rule making committee? (e) can a party sue because the negotiated rule committee has struck a private deal?

EO/csd