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Agency of Administration

**TO: House Committee on Government Operations
Senate Committee on Government Operations
House Committee on Judiciary
Senate Committee on Judiciary**

FROM: Maribeth Spellman, Commissioner

DATE: December 15, 2014

SUBJECT: Administrative Hearing Officers – 2014 ACT 185

Overview

Act 185, “An act relating to the authority of assistant judges in child support contempt proceedings,” directs the Secretary of Administration to adopt a rule establishing “guidelines and oversight” for administrative hearing officers in the Executive Branch. Section One of Act 185 addresses assistant judges in Superior Court Family Division. Section Two directs the Secretary of Administration to adopt a rule establishing “guidelines and oversight” for administrative hearing officers in the Executive Branch. Section Three directs the Commissioner of Human Resources to report to the legislature regarding the “current and potential use and oversight” of Executive Branch administrative hearing officers.

Prior to enacting this law, the legislature convened a Study Committee on Administrative Hearing Officers to report on “the duties, powers, current practices, sources of authority, and qualifications of administrative hearing officers used in Vermont government.” This Committee conducted research and heard from a variety of witnesses before making findings and recommendations to the legislature. The study committee found there are 12 full-time State Executive Branch employees whose exclusive duty is to act as an administrative hearing officer, and over 200 employees and contractors who function in whole or in part as hearing officers. Act 185 directs that the rule adopted under Section Two will only apply to the 12 full-time State employees whose exclusive duty is to act as an administrative hearing officer in the Executive Branch. While the statute does not designate a date by which a rule must be adopted, a proposed rule has been drafted, and the Agency of Administration expects to commence the rulemaking process in the coming year.

Section Three of Act 185 directs the Commissioner of Human Resources to report to the House and Senate Committees on Government Operations and Judiciary regarding the “current and potential use and oversight” of Executive Branch administrative hearing officers in State government. The report must identify all State employees and contractors who function in whole or in part as hearing officers; and analyze the feasibility and costs of providing education and training to full-time hearing officers covered by the rule above, expanding the rule to all State employees and contractors who function in whole or in part as hearing officers, and providing education and training to all State employees and contractors who function in whole or in part as hearing officers. Accordingly, this report is submitted for your consideration.

Hearing officers

The Legislative Study Committee on Administrative Hearing Officers sent two detailed questionnaires about hearing officer use to all State agencies and departments, including questions about how many individuals serve as hearing officers. This is a summary of the self-reported responses from the agencies and departments.

State employees and contractors who function in whole or in part as hearing officers¹:

- Agency of Agriculture: 1 employee
- Agency of Education: undisclosed number of employees and contractors
- Agency of Human Services: 4 Hearing Officers (exclusive duties); 3 employees; 1 contractor
- Agency of Natural Resources: 3 employees
- Agency of Transportation: 1 Policy and Hearings Examiner (exclusive duties)
- Department of Aging & Independent Living: 10 employees
- Department of Children & Families: 19 employees; 8 contractors
- Department of Corrections: 100 employees
- Department of Financial Regulation: 1 contractor (exclusive duties)
- Department of Forests, Parks & Recreation: 1 employee
- Department of Health: 4 employees; 1 contractor
- Department of Human Resources: 25 employees
- Department of Labor: 4 Administrative Law Judges (exclusive duties); 2 Workers’ Compensation Hearing Officers (exclusive duties); 3 contracted Employment Security Board members (exclusive duties); 1 employee
- Department of Liquor Control: 5 contracted Liquor Control Board members (exclusive duties); 1 employee
- Department of Public Safety: 6 employees; 1 contractor
- Department of Tax: 1 full-time Hearing Officer (exclusive duties); 2 employees
- Department of Vermont Health Access: 3 employees; 1 contractor
- Office of the State Treasurer: 1 contractor (exclusive duties)
- Green Mountain Care Board: 2 employees
- Labor Relations Board: 6 board members

¹ When the employee or contractor’s exclusive duty is to act as a hearing officer, it is indicated, along with title. Where not so indicated, hearing officer duties constitute only part of the employees’ or contractors’ job duties.

- Natural Resources Board: 27 contractors
- Office of Professional Regulation: 1 employee; 3 contractors
- VOSHA Review Board: 5 contractors (exclusive duties)

Feasibility and costs of expanding the rule to all State hearing officers

Act 185 directs the Secretary of Administration to adopt a rule establishing “guidelines and oversight” for administrative hearing officers in the Executive Branch. This direction is codified in 3 V.S.A. § 221, which states the rule is to include ethical standards for hearing officers, and other administrative requirements. As stated above, this rule is not yet in place, and the rulemaking process will commence soon. The rulemaking process typically takes several months, and involves a Prefiling with the Interagency Committee on Administrative Rules; an Economic Impact Statement; a Public Input Statement; filing the Proposed Rule with the Office of the Secretary of State; a public comment period, review of public comments, and possible amendment to the Proposed Rule; filing the Final Proposed Rule; and filing the Adopted Rule. Once adopted, this rule will only apply to the 12 full-time State employees whose exclusive duty is to act as an administrative hearing officer in the Executive Branch. The legislature requested the Commissioner of Human Resources analyze the cost and feasibility of broadening the rule to apply to all full and/or part-time employees and/or contractors whose duties include acting as an administrative hearing officer.

In order to expand the rule established under 3 V.S.A. § 221 to apply to over 240 additional State employees and contractors; it must be amended through the formal rulemaking process outlined above. This would again involve a Prefiling with the Interagency Committee on Administrative Rules; an Economic Impact Statement; a Public Input Statement; filing the Proposed Rule with the Office of the Secretary of State; a public comment period, review of public comments, and possible amendment to the Proposed Rule; filing the Final Proposed Rule; and filing the Adopted Rule.

The feasibility of expanding this rule also depends largely on the ability of State departments and agencies to implement the rule. Currently, the rule as envisioned by the statute would apply to twelve full-time State employees whose exclusive duty is to act as a hearing officer and impact four agencies or departments. Expanding this rule to encompass all employees and/or contractors who act as hearing officers would result in this rule affecting 22 different agencies, departments or boards in the State.

The cost of engaging in the rulemaking process is manageable and within the scope of duties regularly performed by state employees. The act of applying the rule to hearing officers should likewise be manageable as the scope of the statutory language and the rule it contemplates reflects a reasonable approach towards oversight of hearing officers. The cost of expanding the rule to the broader pool of contractors may incur some additional cost as the contractors may well build the cost of compliance into their rates/contract bids.

A potential cost to the State comes from the monitoring and enforcement of this rule. Per statute, the adopted rule must require agencies and departments to designate procedures for the receipt, consideration, and determination of complaints about the conduct of hearing officers. Additionally,

the adopted rule must require agencies and departments to provide a copy of the rules of procedure for the proceeding, and for complaints about hearing officers, to all parties in a hearing. Therefore, each agency and department must design and implement a mechanism of monitoring and enforcement. This will clearly generate a cost to agencies and departments, with the monitoring and enforcement procedures differing throughout the State based on scope of the hearings process and volume of the work. The differences in scope and volume will necessarily impact cost.

Cost of providing training

The legislature directed this report to analyze the feasibility and costs of providing education and training to the employees whose exclusive duty is to act as a hearing officer, and further the cost of providing education and training to all State employees and contractors who function in whole or in part as hearing officers. The education and training is to include content related to: the importance to the proceedings of fairness, impartiality, and the appearance of impartiality; the rules of evidence; legal writing, reasoning, and decision making; the ethical standards established pursuant to 3 V.S.A. § 221(b)(1); confidentiality; and the participation of pro se parties.

An education and training program that encompasses these requirements is not currently provided by the State. However, individual agencies and departments may already have their own training programs established that incorporate all relevant and required subjects. The State sponsors continuing legal education programs for State attorneys that may include aspects of the above requirements, but no program is likely fulfill all. The cost of creating such a program is difficult to accurately calculate, but if comparing this program to a continuing legal education program, the Vermont Bar Association typically charges approximately \$150/attendee for an all-day (six hour) training event. Applying that cost to twelve attendees who work exclusively as hearing officers would cost the State \$1800 for six hours of training. Applying that cost to the approximately 250 employees and contractors who work in whole or in part as hearing officers for the State would incur a cost of at least \$37,500. As the attendees would participate in the training during their regular work hours, as part of their regular work duties, there would be an additional cost to the State for mileage reimbursement.

Creating and implementing a State-wide training program that incorporates content related to the rules of evidence; legal writing, reasoning, and decision making; statutory ethical standards; fairness and impartiality; confidentiality; and the participation of pro se parties for approximately 250 administrative hearing officers is possible but would require additional resources. Much is dependent on who is responsible for conducting the training, how often it is offered, and where it is held. Additionally, hearing officers throughout the State agencies and departments handle a variety of vastly different proceedings, and it may be difficult to develop a program that effectively and equally applies to all officers in all agencies and departments.

Agencies and departments who offer training within their organization to all employees and contractors who act as hearing officers would need additional resources to do so. The agency or department could determine whether to create its own training program or send hearing officers to outside training.

Conclusion

There are currently 22 agencies and departments that employ approximately 250 individuals who perform hearing officer functions, either as their exclusive duties or on a part-time basis. The Administration intends to engage in the rulemaking process within the coming year to satisfy the requirements of Act 185. With the scope of the rule applying to full-time hearing officers only, the cost associated with implementation of the rule as well as satisfying training and education requirements are manageable. Expanding the rule to cover approximately 250 individuals who perform vastly disparate functions in vastly disparate forums would prove more difficult and costly.