

Agency of Human Services (AHS) Suggested Changes to H. 908

I. Sec. 2. Definitions

The definitions for guidance document and procedure are so broad that the terms could apply to anything an agency puts in writing that may affect any person besides an employee of the agency. The terms as defined lack the exemptions provided in the Model APA that “guidance document” was based on. This results in at least three major categories of concern:

- new burdens that would be placed on agencies to publish and index all records covered by these terms that, without exemptions, cover just about all records created;
- restricting the functioning of executive branch agencies, especially in such areas as child protection;
- eliminating agency discretion to act in their area of expertise by precluding agencies from relying on a procedure or guidance document unless it is compiled, published, and indexed. *See* 3 V.S.A. § 835.

We would propose inserting the following exceptions taken, in part, from the Model APA and the Public Records Act.

(15) “Procedure” or “guidance document” does not mean:

(a) a written record that concerns only the internal management of an agency and which does not affect private rights or procedures available to the public;

(b) an intergovernmental or interagency memorandum, directive, or communication that does not affect private rights or procedures available to the public;

(c) a written record which by law is designated confidential or by a similar term;

(d) a written record which by law may only be disclosed to specifically designated persons;

(e) a written record which, if made public, would violate duly adopted standards of ethics or conduct for any profession regulated by the state;

(f) a written record which, if made public, would violate duly adopted standards of ethics or conduct;

(g) a written record which, if made public, would violate any statutory or common law privilege other than the common law deliberative process privilege;

(d) a written record that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or defending, prosecuting, or settling cases, if disclosure of the criteria or guidelines would compromise an investigation or the health or safety of an employee or member of the public, enable persons violating the law to avoid detection, facilitate disregard of requirements imposed by law, or give an improper advantage to persons that are in an adverse position to the state.

- II. We agree with the concerns raised by the Public Utilities Commission (PUC) regarding the third prong of the definition for arbitrary – that “as written, subsection (C) basically substitutes the judgment of a “reasonable person” for the judgment of an agency to which the Legislature has delegated responsibility to develop and apply its expertise in developing regulations.” The agency supports their request for the following change:

(C) The decision made by the agency would not make sense to a reasonable person.

Be replaced with:

(C) The agency failed to utilize a process that fully considered the varying points of view and facts presented during the rulemaking process.

- III. The changes made to §835 of the statute places new ill-defined burdens on state agencies. It requires agencies to explain and justify any action taken in a “contested case” or “proceeding” at variance with that expressed in a “guidance document”. Contested case is a term defined later in the statute, but proceeding is not defined and should be struck.

- 17 (b) Use in ~~proceedings~~ contested cases. A procedure or guidance document shall not have
18 the force of law.

(1) An agency that proposes to rely on a procedure or guidance document to the detriment of a person in any contested case ~~or other administrative proceeding~~ shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in

the document. The agency shall not use the document to foreclose consideration of issues raised in the document. 3 (2) This subsection shall not apply to a procedure if a statute that

4 specifically enables the procedure states that it has the force of law.

5 (c) Advocacy at variance with document. If an agency proposes to act or

6 advocate in a contested case or other proceeding at variance with a position

7 expressed in a procedure or guidance document of the agency, it shall provide a

8 reasonable explanation for the variance. If an affected person in an adjudication

9 may have relied reasonably on the agency's position, the explanation must include

10 a reasonable justification for the agency's conclusion that the need for the variance

11 outweighs the affected person's reliance interest.

IV. §836 Procedure for Adoption

This is a new set of requirements for agencies to post all documents associated with a rulemaking. Posting all comments and redacting sensitive personal information will be extremely burdensome in rulemakings that generate a large volume of comments.

Although the current draft does not require the redaction of protected health information (PHI), AHS, as a covered entity, will be obligated to make such redactions. Agencies are already required to justify in writing to LCAR any decisions made to overrule substantial arguments and considerations for or against the proposed rule. *See* 3 V.S.A. §841 (b).

These are effectively comment summaries which, if posted, would accomplish the goal of informing the public of the nature of the comments. Due to these concerns we would ask for 3 V.S.A. §836 (b)(2)(D) to be struck.

12 ~~(D) Each comment submitted to the agency on the proposed rule:~~

13 ~~The agency shall redact sensitive personal information from the posted~~

14 ~~comments. As used in this subdivision (D), "sensitive personal information"~~

15 ~~means each of the items listed in 9 V.S.A. § 2430(5)(A)(i) (iv) and does not~~

18 ~~include the name, affiliation, and contact information of the commenter.~~

V. § 841 Final Proposal

Agencies are already required to cite to their specific or general statutory authority for proposing a rule. In accordance with current law LCAR distributes a summary of final proposed rules to the chairs of the appropriate standing committees who then can alert LCAR if they think the final proposed rule is contrary to the intent of the legislature. *See* 3 V.S.A. § 841 (c) and (d). Case law provides deference to executive branch agencies in the creation and interpretation of rules within their authority. Here, the new provision requires agencies *prove* to LCAR *how* the proposed rule is within its authority and *why* the rule is not arbitrary. We would propose this language be struck.

~~(1) With the final proposal, the agency shall include a statement that succinctly and separately addresses each of the following:~~

~~(A) how the proposed rule is within the authority of the agency;~~

~~(B) why the proposed rule is not contrary to the intent of the Legislature;~~

3 ~~(C) why the proposed rule is not arbitrary;~~

4 ~~(D) the strategy for maximizing public input that was prescribed by~~
5 ~~the Interagency Committee on Administrative Rules and the actions taken by~~
6 ~~the agency that demonstrate compliance with that strategy; 7—~~

7 ~~(E) the sufficiency of the economic impact analysis; and~~

8 ~~(F) the sufficiency of the environmental impact analysis.~~

VI. § 842 Review by Legislative Committee

The bill strikes (d) that allowed for an agency to adopt a rule without change. We would request that this language be added back to § 842 (b).

6 (b) The Committee may object under this subsection if:

7 (1) a proposed rule is beyond the authority of the agency;

8 (2) a proposed rule is contrary to the intent of the Legislature;

9 (3) a proposed rule is arbitrary; ~~or~~

10 (4) the agency did not adhere to the strategy for maximizing public
11 input prescribed by the Interagency Committee on Administrative Rules;
12 (5) a proposed rule is not written in a satisfactory style in accordance
13 with section 833 of this title;
14 (6) the economic impact analysis fails to recognize a substantial
15 economic impact of the proposed rule, fails to include an evaluation and
16 statement of costs to local school districts required under section 838 of this
17 title, or fails to recognize a substantial economic impact of the rule to such
districts; or
(7) the environmental impact analysis fails to recognize a substantial
environmental impact of the proposed rule.

8) The agency may then cure the defect and adopt the rule, or it may adopt the
rule without change.

VII. § 845 Effect of Rules

§ 845(b) Eliminates the ability of an agency to exercise any discretion to grant a variance or waiver to a rule by striking the word “routine”. The agency agrees that the routine granting of variances or waivers should require additional rulemaking or specific criteria in rule, but agencies should be given some flexibility to determine whether a variance or waiver is called for in unusual circumstances or for good cause shown. We would request that “routine” be added back into the first sentence.

10 (b) No agency shall grant *routine* waivers of or variances from any
11 provisions of its rules without either amending the rules, or providing by
12 rule

12 for a process and specific criteria under which the agency may grant a
waiver

13 or variance procedure in writing. The duration of the waiver or variance
may be temporary if the rule so provides.